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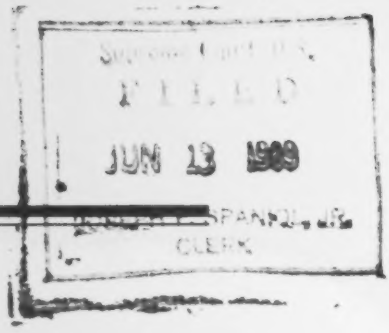

No. 89-

IN THE

Supreme Court Of The United States

October Term, 1989

ROBERT PAETZ,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Civil Service Reform Act of 1978 require judgment in favor of Paetz (petitioner herein) for the relief sought due to failure of the government to adjudicate his civil service claim within a reasonable time?

2. Does the Due Process Clause of the Fifth Amendment require judgment in favor of Paetz for the relief sought due to failure of the government to adjudicate his civil service claim within a reasonable time?

3. To what relief is Paetz entitled, assuming the government failed to adjudicate his civil service claim within a reasonable time?

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Garcia v. United States,
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LaBonne v. Heckler,
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Ross v. United States Postal Service,
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TABLE OF AUTHORITIES — (Continued)

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Sparks Nugget, Inc. v. Scott, 583 F.Supp. 78 (D. Nev. 1984) 20

Vitarelli v. Seaton, 359 U.S. 535 (1959) 19

White v. Mathews, 559 F.2d 852 (2d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978) 20

Constitutional Provisions:

U.S. Const. amend. V ..... passim

Statutes:

5 U.S.C. § 555(b) 3, 18

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5 U.S.C. § 7701 ..... passim

5 U.S.C. § 7702(a)(1) ..... passim

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TABLE OF AUTHORITIES — (Continued)

Rules: *Page(s)*

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Others:

P. Broida, A Guide to Merit Systems Protection Board Law and Practice (1988) 18

K. Davis, Administrative Law Text (1972) 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Robert Paetz ("petitioner" or "Paetz"), respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on March 16, 1989. In addition, petitioner respectfully requests this Court to reverse the judgment of the court of appeals and enter a judgment in favor of petitioner for the relief sought due to the government's failure to adjudicate his civil service claim within a reasonable time.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported in *Paetz v. United States*, 867 F.2d 1392 (11th Cir. 1987). The court's opinion is reproduced in the Appendix at pages 1-2.

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 16, 1989. (App. 1-2). This petition for a writ of certiorari is being filed within 90 days after entry of the Eleventh Circuit's judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The due process clause of the Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

2. The Civil Service Reform Act of 1978 is codified at 5 U.S.C. § 7701 et seq.

(a) The Civil Service Reform Act of 1978 requires expeditious consideration of a Merit Systems Protection Board ("MSPB") appeal pursuant to 5 U.S.C. § 7701(i)(1) as follows:

> Upon the submission of any appeal to the Board under this section (5 U.S.C. § 7701), the *Board*, through reference to such categories of cases, or other means, as it determines appropriate, *shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness* and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal. (Emphasis added).

(b) The Civil Service Reform Act of 1978 requires the MSPB to expedite to the extent practicable all Civil Service

appeals brought under the Act pursuant to 5 U.S.C. § 7701(i)(4) as follows:

> It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(c) The Civil Service Reform Act of 1978 requires that in actions involving discrimination claims, the MSPB shall decide the claim within 120 days, pursuant to 5 U.S.C. § 7702(a)(1) as follows:

> [T]he Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

The corresponding federal regulation, codified at 5 C.F.R. § 1201.156 (1987), provides:

> When an appellant alleges prohibited discrimination in the petition for appeal, the Board shall decide both the issue of discrimination and the appealable action within 120 days of the filing of the appeal.

3. The Administrative Procedure Act, 5 U.S.C. § 555(b), provides, in pertinent part, as follows:

> . . . With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

4. The Back Pay Act of 1967, as amended, 5 U.S.C. § 5596, provides for recovery of back pay resulting from unjustified personnel action as follows:

> . . . (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regula-

> tion, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee —
>
> . . . (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect —
>
> > . . . (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
> >
> > . . . (ii) reasonable attorney fees related to the personnel action.

5. The Federal Personnel Manual ("FPM"), Chapter 550, Subchapter 8, *Back Pay* (May 7, 1981), provides, in part, as follows:

> 8-2 b. Purpose and applicability. This subchapter applies to the computation, payment, and restoration of pay, allowances, differentials, and employment benefits for the purpose of making an employee whole when the employee, on the basis of an administrative determination or a timely appeal, is found to have undergone an unjustified or unwarranted personnel action. It is intended that the employee be *made whole* financially for pay and employment rights lost or diminished because of the improper action. (Emphasis supplied).
>
> 8-4 d. Unjustified or unwarranted. To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of *either substantive or procedural defects* after consideration of the equitable, legal, and procedural elements involved in the personnel action. (Emphasis added).

> 8-5 a. Corrective action. When an appropriate authority corrects an unjustified or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account (limiting the accumulation to the maximum prescribed by law or regulation for the employee) of the employee as if the unjustified or unwarranted personnel action had not occurred, and the employee shall be considered for all purposes to have rendered service in the agency for the period covered by the corrective action . . .

6. The Civil Service Reform Act of 1978, codified at 5 U.S.C. § 7703(a)(1), provides as follows:

> Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the MSPB may obtain judicial review of the order or decision.

STATEMENT OF THE CASE

Robert Paetz, petitioner herein, is one of the original 118-member Rocket Team which came to the United States from Germany in 1945 with Dr. Wernher Von Braun, under what is known as the Paper Clip Contract ("Special Contract for Employment of German Nationals with the War Department in the United States"). Paetz subsequently became a citizen and a federal employee in the United States Civil Service.

From 1945 until 1972, Paetz rendered uninterrupted federal service in increasingly responsible positions in the United States defense and space programs (Redstone, Mercury, Jupiter, Saturn I, Saturn IB, and Saturn V, which was the Apollo Moon Program). Numerous commendations and awards were given to Paetz throughout his civil service career, including recognition for sustained superior performance and outstanding performance.

In 1971, Paetz was subjected to a reduction-in-force ("RIF") at the George C. Marshall Space Flight Center, a

National Aeronautics and Space Administration ("NASA") installation in Huntsville, Alabama. The U.S. government first notified Paetz that his service would be terminated, but in lieu of separation, on September 1, 1971, Paetz was downgraded from a GS-15 position in AST Launch Vehicle Project Management, the grade he had held for 15 years, to a GS-12 position in AST Technical Management. Paetz appealed his RIF to the Atlanta Regional Office of the U.S. Civil Service Commission ("CSC"). (App. 167-185). On July 12, 1972, Paetz's GS-12 position was terminated, and he was separated from the Civil Service. Paetz also appealed this 1972 RIF action to the Atlanta Regional Office of the CSC. (App. 152-160). At the time of separation, Paetz was 63 years old and had accumulated 27 years of government service.

The administrative proceeding in Paetz's case (the 1971 and 1972 RIF appeals were consolidated) had been pending without a final decision in excess of ten years at the time of the MSPB's final decision on March 1, 1984. The chronology of Paetz's case from its commencement in 1971 until the time of this petition is as follows:

Action	Date	Elapsed Time
1. Notification of downgrading.	Aug 16, 1971	0
2. Appeal to CSC of 1971 RIF action. (App. 167-185).	Oct 15, 1971	2 months
3. Denial of appeal of 1971 RIF action. (App. 161-166).	May 3, 1972	8 months
4. Appeal to CSC of 1972 RIF action. (App. 152-160).	Jun 30, 1972	10 months
5. Separation from Civil Service.	Jul 12, 1972	10 months

Action	Date	Elapsed Time
6. Board of Appeals and Review ("BAR") affirms 1971 decision of CSC. (App. 146-151).	Dec 7, 1972	1 year 4 months
7. CSC's denial of appeal of 1972 RIF action. (App. 142-145).	Dec 12, 1972	1 year 4 months
8. Appeal to BAR, 1972 RIF action.	Dec 26, 1972	1 year 4 months
9. BAR affirms decision of 1972 RIF action. (App. 140-141).	Apr 23, 1973	1 year 8 months
10. Petition filed with CSC to reopen and reconsider decision of BAR in connection with 1971 RIF. (App. 120-139).	Feb 18, 1974	2 years 6 months
11. CSC denies petition to reopen and reconsider. (App. 118-119).	Jun 11, 1974	2 years 10 months
12. Action filed in U.S. District Court seeking judicial review of both RIF's. (App. 111-117).	Feb 12, 1975	3 years 6 months
13. District Court Order denying defendant's motions for summary judgment and remanding case to CSC for *de novo* hearing. (App. 110).	Feb 1, 1977	5 years 6 months

	Action	Date	Elapsed Time
14.	Prehearing conference in which parties agree to incorporate record of 1971 and 1972 appeals in new proceeding; age discrimination identified as issue pertinent to both RIF's.	May 13, 1977	5 years 9 months
15.	CSC rescinds Dec. 12, 1972 order denying appeal of 1972 RIF action. Presiding Official also rescinds Dec. 7, 1972 order denying appeal of 1971 RIF action. (App. 108-109).	Jul 22, 1972	6 years
16.	Administrative hearing on 1971 RIF.	Sep 28-29, 1977	6 years 2 months
17.	Administrative hearing on 1972 RIF.	Sep 30, 1977	6 years 2 months
18.	Atlanta Field Office of CSC decides adversely to Paetz in both cases. (App. 95-107).	Apr 6, 1978	6 years 10 months
19.	MSPB rescinds Apr. 6, 1978 decisions and remands cases to Atlanta Field Office of MSPB. (App. 87-94).	Jul 19, 1979	8 years
20.	MSPB, Atlanta Office, decides both cases adversely to Paetz. (App. 79-86).	Jun 1, 1981	9 years 10 months

	Action	Date	Elapsed Time
21.	Paetz files motion with MSPB for decision in his favor due to government's failure to adjudicate his claims within a reasonable time. (App. 58-78).	Jan 27, 1982	10 years 5 months
22.	MSPB, Washington Office, enters modified decision, effective April 5, 1984. (App. 52-57).	Mar 1, 1984	12 years 8 months
23.	Paetz files civil action in U.S. District Court. (App. 43-51).	Apr 4, 1984	12 years 9 months
24.	District Court grants government's motion for summary judgment. (App. 41-42).	Apr 24, 1985	13 years 9 months
25.	District Court denies Paetz's motion for new trial or in the alternative to alter or amend judgment and transfer cause to U.S. Court of Appeals for the Federal Circuit. (App. 40).	May 2, 1985	13 years 9 months
26.	Paetz appeals District Court's April 24, 1985 and May 2, 1985 judgments to U.S. Court of Appeals for the Eleventh Circuit. (App. 39).	May 29, 1985	13 years 10 months

	Action	Date	Elapsed Time
27.	U.S. Court of Appeals reverses District Court's judgment and remands case to District Court for further proceedings. (App. 19-38).	Aug 11, 1986	15 years
28.	District Court orders its Clerk to file in this action the original court record in CV75-G-1067-NE styled "Paetz v. United States".	Nov 19, 1986	15 years 4 months
29.	District Court orders MSPB to file copy of Administrative Record of Paetz's case with the Court.	Nov 19, 1986	15 years 4 months
30.	District Court orders MSPB to re-double its efforts to locate administrative files and report in writing to the Court.	Jan 13, 1987	15 years 5 months
31.	District Court enters pretrial order.	May 26, 1987	15 years 10 months
32.	Paetz and Government file joint motion to defer issue of damages until after hearing on May 10, 1988. Approved by the District Court.	May 6, 1988	16 years 8 months
33.	Non-jury trial in District Court.	May 10-12, 1988	16 years 8 months

Action	Date	Elapsed Time
34. Clerk's court minutes show finding of fact and conclusions of law dictated into the record by the Court and judgment entered in favor of defendant and against plaintiff Robert Paetz. (App. 3-18).	May 16, 1988	16 years 9 months
35. Paetz files notice of appeal to Court of Appeals.	Jul 1, 1988	16 years 10 months
36. Court of Appeals decides appeal adverse to Paetz. (App. 1-2).	Mar 16, 1989	17 years 7 months
37. Paetz files petition in U.S. Supreme Court for writ of certiorari.	June 1989	17 years 9 months

On February 1, 1977, upon Paetz's first court appeal of his case, the U.S. District Court remanded the case to the CSC for a *de novo* hearing, primarily because it appeared to the court that the government failed to disclose to Paetz adverse letters written by two government employees to the CSC office in Atlanta regarding his 1971 RIF claim. (App. 110).

The CSC's Atlanta Field Office held a *de novo* hearing on Paetz's case on September 28-30, 1977 and decided adversely to Paetz on April 6, 1978. (App. 95-107). On July 19, 1979, the MSPB rescinded the Atlanta Field Office decision of April 6, 1978 and remanded Paetz's case to the Atlanta Field Office, based on the government's error in processing Paetz's case as follows:

> Under the circumstances, the Board hereby rescinds the April 6, 1978 decisions of the Atlanta

> Field Office and remands the appellant's cases to that office for further proceedings consistent with this decision, because of the Field Office's prior failure to consider the appellant's request for the Director, MSFC, as a witness in light of the interrogatories relative to the age discrimination issue, and the denial of opportunity for the appellant to obtain response to those interrogatories or pertinent testimony in lieu thereof. (App. 94).

Following remand of the cases on July 19, 1979, it took *almost two years* before the Atlanta Office of the MSPB again decided adversely to Paetz on June 1, 1981. (App. 79-86). The cases were again reviewed in the Washington office of the MSPB, and after another delay of *almost three years,* the MSPB entered a modified decision on March 1, 1984. (App. 52-57). The MSPB found that Paetz established a *prima facie* case of age discrimination with regard to the 1971 RIF under *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973). (App. 55). At the time of the March 1, 1984 modified decision by the MSPB, *12 years and 8 months* had elapsed since the original downgrading on August 16, 1971. Almost *five years* had elapsed since the last remand by the MSPB on July 19, 1979 until its final decision on March 1, 1984.

Paetz vigorously pursued his case before the MSPB until the final MSPB decision on March 1, 1984. On January 27, 1982, Paetz filed a motion for decision in his favor due to the government's failure to adjudicate his claims within a reasonable time. (App. 58-78). On February 17, 1982, Paetz filed a memorandum in support of said motion. This motion itself remained pending before the MSPB for over two years prior to the Board's final decision in Paetz's cases, dated March 1, 1984. (App. 52-57). The errors in the earlier administrative decisions, which resulted in rescission of four decisions and remand of two decisions, were not due to any fault of Paetz. In the meantime, during the lapse of time between the filing of the original appeal and the final order of the MSPB on March 1, 1984, Paetz aged twelve years, from age 62 at the time of the first RIF to age 74. His

position before the court for relief has substantially changed, as Paetz is now 80 years old.

Paetz sought judicial review of his case after the MSPB issued its final decision. (App. 43-51). After summary judgment was rendered by the district court in favor of the government (App. 41-42), Paetz appealed his case to the Eleventh Circuit, who reversed and remanded Paetz's case to the district court. (App. 19-38). On May 10-12, 1988, a non-jury trial was held, and judgment was rendered against Paetz by the district court. (App. 3-18). Paetz appealed his case to the Eleventh Circuit, who decided adversely to Paetz on March 16, 1989 (App. 1-2). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the rights of a terminated or downgraded civil service employee arising from the government's failure to adjudicate the employee's administrative claim within a reasonable time. The Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 7701 et seq., mandates expeditious consideration and conclusion of an appeal to the MSPB. 5 U.S.C. § 7701(i)(1), (4). Since this case involves an issue of discrimination, the requirement for speedy administrative adjudication is even stronger, as the MSPB is statutorily required to decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedure *within 120 days* of the filing of the appeal. 5 U.S.C. § 7702(a)(1). In addition, an unwarranted and unreasonable delay in the administrative process may constitute a violation of due process of law under the Fifth Amendment, as this Court has itself acknowledged. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'.") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

While the mandates of the CSRA and the due process clause for expeditious consideration and conclusion of an MSPB appeal are clear, the problem which proved fatal to petitioner's claim in the court of appeals below[1] resulted from the fact that *no* existing federal court cases set forth a standard defining unwarranted, "unreasonable delay" in an administrative agency's actions, even though the CSRA has now been in effect for over a decade. This issue becomes even more important in light of the recognized fact that "[o]ne of the supposed advantages of the administrative process is speedy disposition of controversies. But the unfortunate fact is that many administrative proceedings are slower than comparable judicial proceedings." K. Davis, Administrative Law Text at 202 (1972). This Court is respectfully requested to settle this important question of federal law regarding what constitutes unreasonable delay in the administrative process, for the future guidance of the federal courts, as well as the MSPB.

This case provides an ideal opportunity for this Court to settle the state of the law on these issues,[2] as Paetz's case pended before the MSPB on a single petition for review of the Atlanta Field Office's decision from June 1, 1981 until March 1, 1984. The motion filed by petitioner with the MSPB on January 27, 1982 for a decision in his favor due to the government's failure to adjudicate his claim within a reasonable time pended before the MSPB for over two years before the final order was issued on March 1, 1984. The current state of the law clearly mandates that a federal employee who is downgraded, terminated or subjected to other adverse administrative agency actions must promptly

[1]During oral argument of this case before the Court of Appeals for the Eleventh Circuit in Atlanta, Chief Judge Roney, presiding over the panel (with Circuit Judge Hatchett and Senior Circuit Judge Henderson) asked what cases Paetz cited in support of his claim for relief due to the alleged unreasonable delay of the MSPB in deciding his case. App. 1-2. Unfortunately, there are *no* decided cases precisely on point.

[2]While petitioner's claim arose in 1971, some 8 years before the CSRA, the last five years (from January 1979 until March 1, 1984) of administrative consideration of the case were conducted by the MSPB pursuant to the CSRA procedures.

pursue the resulting administrative claim.[3] In reviewing this petition for certiorari, the Supreme Court is urged to bear in mind the principle that justice delayed is justice denied, and that an employee must generally exhaust administrative remedies *before* seeking judicial review of an agency's action. As the law requires a federal employee to promptly and expeditiously pursue his administrative claim, this Court is respectfully requested to settle the law with respect to the government's corresponding duty to act on such claims promptly and expeditiously. For all the foregoing reasons, the writ should be granted. Sup. Ct. Rule 17.

I. The Civil Service Reform Act Of 1978 Requires Judgment In Favor Of Paetz For The Relief Sought Due To Failure Of The Government To Adjudicate His Civil Service Claim Within A Reasonable Time.

Paetz's administrative claim in this case alleges that the government's adverse actions against him were based on discrimination prohibited by sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (codified at 29 U.S.C. § 631, 633(a)). In such cases, the MSPB is required by law to decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures within 120 days of the filing of the appeal. 5 U.S.C. § 7702(a)(1).[4] However, Paetz's case was not decided during the administrative process for a period of seven years. The U.S. District Court remanded Paetz's case to the CSC for

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[3]An employee must file a petition for appeal of an adverse action to the MSPB not later than *twenty* days after the effective date of the action. 5 C.F.R. § 1201.22 (1987). A petition for review of the initial decision of the presiding official must be filed by the employee with the clerk of the MSPB in Washington *within thirty-five days* of the issuance of the initial decision. 5 C.F.R. § 1201.114(d) (1987). An employee seeking judicial review of a final MSPB order or decision must file a petition for review with the appropriate federal court within *thirty days* after receiving notice of the final order or decision. 5 U.S.C. § 7703(b)(1), (2).

[4]The corresponding MSPB regulations expressly provide that the "Board *shall decide* both the issue of discrimination and the appealable action within 120 days of the filing of the appeal." 5 C.F.R. § 1201.156 (1987) (emphasis added).

a *de novo* hearing on February 1, 1977, and the MSPB did not issue its final decision on the case until March 1, 1984.

The CSRA further requires the MSPB to render expeditious consideration of all other appeals. Upon the submission of any appeal to the MSPB, the Board, pursuant to 5 U.S.C. § 7701, shall establish and announce publicly the date by which it intends to complete action on the appeal. This date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, then the Board is required to announce the date by which it intends to complete action on the appeal. 5 U.S.C. § 7701(i)(1). The CSRA further provides, at 5 U.S.C. § 7701(i)(4), that "[i]t shall be the duty of the Board . . . to expedite to the extent practicable that proceeding." Expeditious consideration of an MSPB appeal is thus a procedure required by law. The corresponding MSPB regulations expressly provide that the "Board *shall decide* both the issue of discrimination and the appealable action within 120 days of the filing of the appeal." 5 C.F.R. § 1201.156 (1987) (emphasis added).

Paetz's right to adjudication of his claim within a reasonable time has been violated due to inordinate delay and government neglect, as evidenced by the fact that the 1971 RIF appeal extended over a period of twelve years, until the time of the final MSPB decision on March 1, 1984. Both the MSPB and the agency totally ignored the age of the case, as well as the statutorily required procedural time limitations.

The agency made no effort to expedite the appeal, and by its silence, concurred in the delay. This delay in adjudicating Paetz's case was unwarranted and unreasonable. No adequate reason has ever been given to explain the agency's inordinate delay in deciding Paetz's case, including his motion for a decision in his favor due to the government's failure to adjudicate his claims within a reasonable time which pended before the agency for over two years. MSPB claim consideration is an integral part of requisite agency procedure. Well over a decade is not a "reasonable time."

The agency has made no showing that this length of time was reasonably required to reach its decision. Attempts to blame Paetz for the delay are not persuasive. Indeed, the underlying reasons for the numerous delays, including reversals of initial decisions, are evidence of the weakness of the agency's case.

In the meantime, during the eleven and twelve year lapses of time between the filing of the original appeal and the final order of the MSPB on March 1, 1984, Paetz grew from age 62 to age 74. His position before the Court in this case substantially changed to his detriment. His case became stale and was viewed as an "old" case. No one at the MSPB or the agency took any interest in securing prompt consideration and conclusion of the claim. Paetz is now 80 years old and is required to continue to pursue this action even though he has suffered severe health problems which impair his ability to prepare and present his case to the Court. This would not be so if the MSPB and the agency had adjudicated Paetz's case within a reasonable time. The agency also had a responsibility to see that the case was adjudicated within a reasonable time, yet it took no action to expedite the case. As is well known to the Court, justice delayed is justice denied, and indeed, this Court has itself stated "[w]e do not mean that delay in the administrative process is other than deplorable." *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 265 (1969).

The United States District Court for the Northern District of Alabama issued an order on February 1, 1977 (Civil Action No. 75-G-0167NE), granting a *de novo* hearing of Paetz's claim by the CSC. The case was already six years old, and consideration and conclusion of the case should have been expedited by the government. Instead, the government delayed action until the MSPB rendered its final decision on March 1, 1984. This period of time alone was over seven years. People are presumed dead if they are not heard from in seven years. World wars have been fought in less time. In this case, it is too long. The agency and the MSPB had a statutory duty to expedite Paetz's case, but there is no evidence that either the agency or the MSPB sought to

expedite the case at any time. We now find that well over *seventeen years* has elapsed since the original RIF, and Paetz's ability to prosecute his case has been prejudicially diminished due to this long passage of time. Many witnesses have died and the recollection of the other witnesses have dimmed with the passage of time. Paetz's health has deteriorated, and he is too old to return to work even if he is entitled to reinstatement. The long delay has thus substantially harmed Paetz's case, as well as his ability to pursue judicial relief. Paetz has been denied the right to timely administrative review. In Peter Broida's A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (1988), the guide states:

> Even the GAO has noted problems in case processing in a 1987 report on the Board. For FY 1987, the regional offices were deciding 96% of their cases in under 120 days; 61% were decided in less than 90 days. In Washington 27% of the PFR's (petitions for review) were decided in less than 90 days. Regular PFR's took an average of 149 days and addendum PFR's (attorney fee and compliance cases) took an average of 258 days. *Id.* at ii.

However, this case falls well outside the above statistics. This case took over 5 years from the last remand by the MSPB until its final decision on March 1, 1984. This case has taken over seventeen years, from the time of filing of the adverse action until this petition. The extreme delay constitutes prejudicial procedural error.

The Administrative Procedures Act, 5 U.S.C. § 555(b), states "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." This "reasonable time" requirement as statutorily mandated by the Administrative Procedures Act has been interpreted as a requirement that the Department of Health and Human Services normally answer each complaint seeking review of denial of disabilty benefits within the 60 days allotted to it, subject to certain exceptions. *LaBonne v. Heckler,* 574 F.Supp. 1016, 1020 (D. Minn. 1983), *appeal*

dismissed, 732 F.2d 161 (8th Cir. 1984). In *Martel v. Carroll*, 562 F.Supp. 443 (D. Mass. 1983), the District Court considered the case of an air traffic controller who brought an action charging that delay by the Merit Systems Protection Board violated his statutory and due process rights. On motions to dismiss, considered in part as motions for summary judgment, the District Court held that the lapse of fifteen months between the filing and decision of the controller's appeal did not violate 5 U.S.C. § 7701(i)(4) or the due process clause, based upon the MSPB's assertions of a "tremendous increase in the Board's caseload . . . and . . . recent cutbacks in the Board's funding . . ." *Id.* at 444. However, unjustified or unexplained delays in the MSPB's deciding cases may violate the CSRA statute, 5 U.S.C. § 7701(i)(1,4), or rise to the level of a due process violation. U.S. Const. amend. V. Such is the case here.

The Supreme Court is earnestly requested to grant certiorari in this case in order to settle the law regarding the statutory duty of the MSPB to give expeditious consideration and conclusion of an appeal brought under the CSRA. 5 U.S.C. § 7701(i)(1,4). This case is even more urgent and meritorious in light of the MSPB's failure to adjudicate Paetz's discrimination claim within the statutorily mandated 120 day period. 5 U.S.C. § 7702(a)(1).

II. The Due Process Clause Of The Fifth Amendment Requires Judgment In Favor Of Paetz For The Relief Sought Due To The Failure Of The Government To Adjudicate His Civil Service Claim Within A Reasonable Time.

This Court has long recognized that employee discharge procedures and standards are subject to the due process rights of the discharged or adversely affected federal employee. *Arnett v. Kennedy*, 416 U.S. 134 (1974). Substantial and prejudicial delay, for which no reasonable justification is given, may thus constitute a denial of due process under the 5th Amendment of the U.S. Constitution. *Vitarelli v. Seaton*, 359 U.S. 535, 540-46 (1959); *Ross v. United States Postal Service*, 664 F.2d 191, 193 (8th Cir. 1981) ("In affirming the

Board, we note that it delayed nearly a year in deciding whether to review . . . while delays of this length may be prejudicial and cannot be countenanced, no prejudice to Ross from the delay has been shown."); *Caswell v. Califano,* 583 F.2d 9 (1st Cir. 1978); *White v. Mathews,* 559 F.2d 852 (2d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978); *Alsbury v. United States Postal Service,* 530 F.2d 852, 855 (9th Cir. 1976), *cert. denied,* 429 U.S. 828 (1976); *Sparks Nugget, Inc. v. Scott,* 583 F.Supp. 78, 83 (D. Nev. 1984) ("[D]ue process must be accorded within a 'meaningful time' if it is to be effective . . . Extensive delay by the . . . [NLRB] . . . can result in prejudice to the petitioner just as effectively as if the issues . . . were resolved against it on the merits.") (citation omitted); *Martel v. Carroll,* 562 F.Supp. 443 (D. Mass. 1983); *Quintana v. Harris,* 491 F.Supp. 1044, 1047 (D. N.Mex. 1980) ("[u]nreasonable delay in administrative proceedings which may result in the wrongful deprivation of benefits to claimants raises due process implications.").

There is, however, no case in which this Court has settled the law regarding what type of substantial and prejudicial delay, for which no reasonable justification is given, constitutes a denial of due process under the 5th Amendment of the Constitution, though the Court has noted that "the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." *Fusari v. Steinberg,* 419 U.S. 379, 389 (1974). This Court should thus grant certiorari to settle the law regarding the due process to which a federal employee is entitled under the 5th Amendment when the employee contends that the government has failed to adjudicate his claim within a reasonable time.

III. This Court Should Decide The Relief To Which Paetz Is Entitled, Assuming The Government Failed To Adjudicate His Civil Service Claim Within A Reasonable Time.

As stated previously, this Court is respectfully requested to settle the law regarding what constitutes an unreasonable delay in the administrative process. No federal court cases exist in which an aggrieved federal employee has actually

been granted relief due to unwarranted and unreasonable delay in the administrative consideration of his claim. The mandates of 5 U.S.C. § 7701(i)(1,4) and § 7702(a)(1) need to be applied to the facts of this case, and the law thereby settled. Likewise, no federal court cases exist in which an aggrieved federal employee has been granted relief on due process grounds because of unwarranted and unreasonable delay in the administrative consideration of his claim.

In the event this Court does find that an unwarranted and unreasonable delay has occurred in this case, based upon statutory or due process requirements, the Court is requested to settle the law regarding the relief which the employee should be given.

Paetz contends that he is entitled to the appropriate relief for an unjustified adverse personnel action, since his administrative appeal was subjected to unwarranted and unreasonable delay. Accordingly, he contends that pursuant to the Backpay Act of 1967, he is entitled to relief in the amount of all or any part of the pay, allowances, or differentials which he normally would have earned or received during the period if the personnel action had not occurred, less any amount earned by him through other employment during that period, as well as reasonable attorney fees related to the personnel action. 5 U.S.C. § 5596(b)(1). *See Hanifan v. United States,* 354 F.2d 358, 364 (Ct. Cl. 1965) (" '[U]nlawful administrative action depriving a claimant of a procedural right voids the action and leaves the plaintiff entitled to his money otherwise due . . . ' ") (quoting *Garrott v. United States,* 340 F.2d 615 (Ct. Cl. 1965)); *Lezin v. United States,* 98 F.Supp. 574 (Ct. Cl. 1951); *Garcia v. United States,* 108 F.Supp. 608 (Ct. Cl. 1952). The Federal Personnel Manual also provides that in such cases it is intended that the employee be made whole financially for pay and employment rights lost or diminished because of the improper actions. *Federal Personnel Manual,* Ch. 550, § 8 (May 7, 1981).

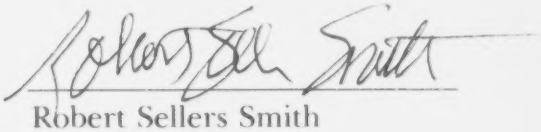
Certiorari should be granted in this case for this Court to settle the law as to the relief to which Paetz is entitled. No Supreme Court case establishes the proper standards and criteria to be used in evaluating the statutory and due process

rights of a federal employee to expeditious consideration and conclusion of an appeal to the MSPB, or the relief to which the employee is entitled.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari for the purpose of settling the law with respect to the rights of an aggrieved civil service employee upon failure of the Government to adjudicate his civil service claim within a reasonable time, reverse the judgment of the Court of Appeals, and remand the case with directions to find in favor of Paetz due to the government's unreasonable delay.

Respectfully submitted,



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APPENDIX

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Robert PAETZ, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 88-7404.

United States Court of Appeals,
Eleventh Circuit

March 16, 1989.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Judge, HATCHETT, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The facts, history, and contentions of the parties in this case are reported in *Paetz v. United States,* 795 F.2d 1533 (11th Cir. 1986). In that opinion, we reversed the district court's determination that it lacked subject matter jurisdiction.

Following our remand, the district court conducted a bench trial May 10-12, 1988. At the conclusion of the bench trial, the district court entered judgment against the appellant. In so doing, based upon the administrative record, the district court rejected the appellant's claims that the government had unreasonably delayed adjudication of his claims and that the administrative agencies had failed to follow procedural regulations. We find no error in these rulings.

Based upon trial evidence, the district court also rejected the appellant's age discrimination claim. In doing so, the district court placed emphasis upon the fact that the incumbent holding position 11408, the position to which the appellant asserts that he should have been assigned, was older than the appellant. The appellant urges that we reverse the district court because the district court placed undue

emphasis on the age of the incumbent to defeat his age discrimination claim.

The parties agree that the standard of review on the age discrimination claim is the "clearly erroneous" standard. The fact that the incumbent in position 11408 was older than the appellant seriously undermines any inference that the decision not to place the appellant in that position was based upon an intent to discriminate because of age. Several circuits have held that replacement of a plaintiff by someone older suggests that no age discrimination exists. *See Palmer v. United States,* 794 F.2d 534, 537 (9th Cir. 1986) (citing *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1013 n. 9 (1st cir. 1979)). Logic supports such an inference. Although appellant argues that the district court placed undue emphasis on the age of the incumbent, according to the record, the district court based its decision on "the entirety of the evidence, giving weight and attention to the statistical evidence and the circumstantial evidence" as well as to "the explanations by many who were involved in the decision." Record 2-17. On a review of the record, we are not "left with the definite and firm conviction that a mistake has been committed." *Duncan v. Poythress,* 657 F.2d 691, 708 (5th Cir. Unit B 1981) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

Accordingly, the district court is affirmed.

AFFIRMED.

CLERK'S COURT MINUTES

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA

ROBERT PAETZ,
Plaintiff,
VS.
UNITED STATES OF AMERICA,
Defendant

JUDGMENT
CASE NUMBER:
CV 84-HM-5231-NE

CLERK'S COURT MINUTES

This action came on for trial on May 11, 1988, before the Court, the Honorable Sam C. Pointer, Jr., United States District Judge, presiding. The issues having been duly tried,

It is ORDERED and ADJUDGED that pursuant to findings of fact and conclusions of law dictated into the record by the Court, judgment is entered in favor of the defendant, United States of America, and against the plaintiff, Robert Paetz. Each side to bear own costs.

DATED: May 12, 1988
Birmingham, Alabama

Court Reporter: David Odom
Also Franklin & Foster

CHARLES T. CLIVER,
CLERK

By: /s/Abby C. Miles
Abby C. Miles
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,	)	
	)	
Plaintiff,	)	
	)	CV NO.
v.	)	84-HM-5231-NE
	)	Huntsville, Alabama
UNITED STATES OF AMERICA,	)	May 12, 1988
	)	
Defendant	)	

* * * * * * * * * * * * * * * * *

TRANSCRIPTS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE HONORABLE SAM C. POINTER, JR., UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the plaintiff:	Robert Sellers Smith, Esquire Bradley, Arant, Rose & White 223 East Side Square Huntsville, Alabama 35801
For the Defendant:	Herbert J. Lewis, III, Esquire Ms. Teresa Washington, Esquire Assistant United States Attorneys Birmingham, Alabama
Court Reporter:	David W. Odom, RPR-CSR 101 Holmes Avenue Room 103-C U.S. Post Office & Courthouse Huntsville, Alabama 35801

Proceedings recorded by mechanical stenography, transcript produced by notereading.

PROCEEDINGS

THE COURT: The Court will now dictate Findings of Fact and Conclusions of Law. The Findings of Fact are based upon evidence that's been presented over the last two days as it relates to the claim here made by plaintiff Robert Paetz that the defendant violated the Age Discrimination in Employment Act. In addition, the plaintiff makes two other claims, both of which are reviewed not on a de novo basis but on the basis of the records submitted to the Court from administrative proceedings in which the plaintiff asserts that the ruling of the administrative proceeding should have been overturned because of untimely action by that board and by that agency, and because there was an improper selection procedure that resulted in his downgrading of pay and ultimate separation from service.

This case is before the Court as the result of a complaint filed in 1984 following the decision, final decision as it turns out to have been, in the administrative process that was rendered in March, 1984.

The complaint contains these three claims or counts: In late 1971 Robert Paetz, the plaintiff, who had been with NASA or its predecessor organizations for some 25 years and who had risen at that point to a GS-15 level, serving as Deputy Manager of the S1C Project of the Saturn V Program, was subjected to potential separation as the result of a reduction in force at the Marshall Space Flight Center, which was, at that time, part of NASA.

He was not, however, actually separated at that point, because approximately two weeks after receiving that notice of potential separation, he was transferred into a position at the GS-12 level as a project engineer onto, what was called on the record, the J-2 Engine Program. This reprieve, however, turned out to be only temporary because approximately 9 months later there was an additional reduction in force which did result in Mr. Paetz's full separation from employment.

In his claims made to this Court, primary focus has been placed on Mr. Paetz's work history and experience and more particularly whether he was qualified to have performed a

job in 1971 as technical assistant to the Director of Laboratories, which was also a GS-15 level position and was held by Mr. Novack who was in a lower retention category than was Mr. Paetz.

Much of the evidence presented by both parties has dealt with that position, the work done by that incumbent and the work and experience of Mr. Paetz.

It's first appropriate that I briefly recount Mr. Paetz's work history. In some degree, in this recounting, I find the facts to be different from a de novo standpoint than they were recited in certain of the earlier administrative hearings. That does not mean, however that as it relates to the non-ADEA claims that the findings made by the administrative agency on those points are necessarily to be reversed in any way.

Shortly after the end of World War II, Mr. Paetz, with more than a hundred other Germans, came to this country under what came to be known as "paper clip contracts," going to Texas to work there for the Army in the development of missiles and subsequent related products that grew out of the original missile programs.

For a number of years that program was under the auspices of the Army and was moved to Huntsville, Alabama as part of the ABMA, the Army Ballistic Missile Agency.

In 1960 that agency became part of NASA and was, at that point, separated from the Army itself.

The work, however, that had been conducted prior to 1960, in effect, was continued, and many of the organizational matters simply came over to NASA as it had been while part of the Army.

In connection with the transfer to NASA, or at least at about the same time, Mr. Paetz, who had openly been converted into a civil service employee at the GS-12 level but who had risen by that time to the GS-15 level was made chief of the electromechanical engineering branch in what has generally been called in this case the Fab Lab. I will so call it. It actually had several names over a course of years.

Mr. Paetz's technical background was in electrical engineering. Up until that point, he had been serving as chief of the electrical engineering branch of the Fab Lab.

In March 1962, some parts of the work of the electromechanical engineering branch were transferred, which included, apparently, much of the work dealing with structural planning.

In September 1963 was detailed from his former position to a position of being technical advisor to the lab director. He served in that capacity for approximately 3 months.

In late December 1963, he was then moved to the position as Deputy Manager of the S1C project of the Saturn V Program. This is in a different Directorate from that of the lab. He performed with skill and with success in this position as he had in his prior positions.

During the late 1960's and extending into the 1970's, significant reductions in personnel at the Marshall Space Flight Center were accomplished which reduced the total number of personnel, ultimately, by over 50% from its highest level of some 7,400 people.

These reductions in force were to be accomplished consistent with regulations in force that described that process and which also provided employees with certain rights.

The earliest of those reductions in force did not adversely affect Mr. Paetz. However, in the summer of 1971 there was a requirement to eliminate approximately 140 positions at Marshall Space Flight Center, and the process for determining those people who would be affected by that RIF.

Very briefly, the procedure in conducting a RIF is as follows — as it relates to this particular institution: NASA Headquarters, in effect, notifies the Marshall Space Flight Center that a certain number of positions must be eliminated or that a particular level of personnel must be established, which has the same result.

The management of the Center then makes a determination as to which directorates should reduce their levels of strength and to what degree. At this point only numbers are involved.

Then, each of these directorates, having been assigned a quota, so to speak, of positions to eliminate makes a determination as to which of its positions it can, with less difficulty, eliminate. Those positions, then, that have been so identified

are reported to the personnel office or the office of manpower, I believe, as it was called for a period of time.

At this point, having received information as to which positions are to be eliminated or can be abolished, there is a first round of determination which involves looking at those jobs so designated and finding other jobs that are essentially interchangeable with them. This is not done based on a new review of those positions but on the basis of information that was developed at the time the various positions were created, and which in turn, indicates those jobs that are essentially interchangeable.

Then, based on that determination, the person or persons with the lowest retention grouping are scheduled for elimination. It's obviously important, then, to know what jobs are to be matched in this way for that first screening.

In this particular case, in the 1971 RIF, it appears that the position that Mr. Paetz held was one which had four other positions that were deemed as interchangeable; so that, in essence, he was among five people to be looked at for that initial screening.

In the second RIF in 1972, there was only one other position that was deemed to be interchangeable. In determining which person among those that are deemed interchangeable is to be initially dropped from that competitive level, employees are grouped. The highest priority group are career employees with veteran preference rights. This group is called Group IA.

The next is career employees who do not have veteran's preference rights. This is group IB.

As category IIA, would be those who are career conditional employees with veteran's rights.

And finally at IIB are those employees who are career conditional employees without veteran preference rights.

A career conditional employee, with some exceptions, not here not necessary to deal with, are those employees who have entered into that competitive service in less than three years earlier.

Within these particular groupings there are further listings based on length of service which may be affected by some other matters including evaluations and the like.

In the initial screening, in the 1971 RIF Mr. Paetz, who did not of course have veteran's rights, was the low person among the five and was therefore scheduled to be dropped from that competitive level.

It might be noted, here, that there is no real selection of Mr. Paetz's position for elimination was the result of any age discrimination or was even unreasonable or improper. It was indeed acknowledged that the S1C project was, in effect, winding down at that point and that this particular position was one that could properly have been selected for elimination.

The real problem comes, however, at the next phase of this RIF procedure. Because of Mr. Paetz having been selected to leave the competitive level, one must look to potential bumping and retreat rights given by regulation. In essence, one can bump or retreat and thereby displace employees in a lower retention priority.

In making the judgment, however, about that, as to those positions that the person is not promoted through, and hence, has no retreat rights for, it is necessary to determine not merely whether the individual is marginally qualified or minimally qualified for that position, such as to have been eligible for promotion had a vacancy then existed, but indeed, the regulations require that a person be fully qualified in the sense that without any significant training the person can step right into the job and it can continue without undue interruption.

It is at this point, then, that the primary focus of this case developed, because there was a position known as 11408, that of technical assistant to the director of the laboratory that was being held by Mr. Novack who was in category IIB. Mr. Paetz was in category IB, therefore, he would have had the right to displace Mr. Novack if he was fully qualified as of that point to take up that position.

The personnel office determined that Mr. Paetz was not qualified, not fully qualified to move into that position, and therefore, could not exercise or have bumping rights to displace Mr. Novack.

Mr. Paetz asserts in this case and has presented evidence to demonstrate that he was fully qualified to do that. In this process, then, the final result was that Mr. Paetz had no positions he could retreat to or bump someone who was in a lower retention group. He was, therefore, scheduled to be separated.

Approximately two weeks later, however, he, in effect, found a position at the GS-12 as project engineer for the J-2 engine project.

There is some dispute as to whether Mr. Paetz performed any work on the J-2 engine project itself. And I find that he, in fact, did not work on the J-2 engine during the period of time he held that position as project engineer in the J-2 engine project. In effect, a job was found for him that was vacant. And he held that job for only about 9 months, because, then, a second RIF occurred. And at this time, that job was scheduled, as it rather obviously should have been, for elimination, because it was not even being performed, at least the particular job to which Mr. Paetz had been assigned.

Following the 1971 RIF and his ultimate assignment to this project engineer's position, Mr. Paetz made an administrative appeal challenging his selection and the failure to allow him to bump into another position. He also challenged the manner in which the competitive levels were established as well as challenging the fact that his 201 record file did not contain adequate and accurate information in all respects.

After the termination in 1972, a challenge to that consequence was made administratively. There then followed, over a period of many years, various reviews, hearings, court cases, appeals, further administrative actions, further court reviews. One can then understand, if not agree with, the assertion that's made in the complaint that there has been an unreasonable delay in the final resolution of these matters that occurred essentially over 15 years ago.

With that background, I want to now turn to consideration of the claim of age discrimination. This is the issue on which evidence has been presented, and the Court has considered this matter de novo.

There are two basic pieces of information that are offered in support of the claim of age discrimination. The first is evidence that in late Spring of 1971, not long before the 1971 RIF occurred there was a meeting involving officials of Marshall in which concern was expressed that the age level of the work force at Marshall was continuing to get older and that there appeared to be too little opportunity for younger persons to be brought into the work force.

It may be noted here that not only that reductions in force occurring during the late 1960's and early 70's but that there were also freezes on employment from time to time that affected obtaining new employees.

That meeting in the spring of 1971, which is documented by minutes, was then followed by correspondence after the 1971 RIF had occurred, in which, reviewing what had occurred, officials at Marshall made recommendations as they had been requested, for changes in the laws.

Among the changes in the laws that were requested would have been curtailment of bumping and retreat rights and reduction in the power of veteran's preference rights in controlling the sequence of persons released or reduced during a reduction in force.

This correspondence, then, both the minutes in the spring of 1971 and the corresondence in the fall of 1971 and spring of 1972 are offered by the plaintiff as evidence that officials at Marshall were biased against older employees. I do not view that evidence, however, as establishing, with any strength, that position.

A careful reading of those materials indicates to me that the concern was not being of bias against older employees or in any way indicating that older employees had been singled out or mistreated during the 1971 RIF, but to the contrary, was simply raising the point that veteran's preferences, number one, have a tremendous impact on RIFs and a concern that with the RIFs and the freezes that had occurred, the work force was getting older at Marshall, with little opportunity to bring new employes into the work force. It is of some value, but, I think, only marginal value, in showing any kind of bias for age.

The other evidence offered in support of a claim of age discrimination is in the form of statistical evidence.

Each of the parties, here, has presented a statistical expert. Each holds a Ph.D.

The expert presented by the plaintiff is qualified and was permitted by the Court to express opinions in the area of statistical analysis. Similarly, the defendant's expert was permitted to do that.

The defendant's expert is better qualified and has greater skill and experience in the area of statistical analysis than did the plaintiff's expert. That does not mean, however, that the defendant's expert in this case is necessarily to be given any greater credence as to the opinions expressed than the plaintiff's expert.

The plaintiff's expert demonstrated that when the average age of those adversely affected during the reduction in force was compared to the average age of the entire Marshall work force, that there was a statistically significant difference; that is, the average age of those adversely affected was higher, and to a statistically significant degree than the average age of all employees in the work force.

Looking solely to engineers and scientists adversely affected in this 1971 RIF, a similar conclusion was reached. The defendant's expert asserted and contended that comparisons with the total work force were inappropriate and that the better and more appropriate comparisons were to be made by looking at those who were in the target group, those who were potentially subject to reduction or elimination by virtue of positions that had been selected for elimination.

This group consists of some 900 persons.

And, accordingly, the defendant's expert conducted analyses comparing persons adversely affected in relation to that population rather than the entire work force population.

In my view, both populations are appropriate for analysis. Because there certainly is potential for age discrimination even in selecting jobs by number. And in that sense, the inquiry as to total population is meaningful. It's also meaningful, however, to look at those who were in the target

group, the nine hundred, rather than the fifty-six hundred — fifty-four hundred, I believe.

Defendant's expert further was of the view that the impact of veteran's preferences had to be accounted for and looked at in the analysis, and through a logistical regression model, determined the influence and association of both age and veteran's preference rights upon those adversely affected from the target group.

This, then, was done by occupational categories. And in that study, the defendant's expert concluded that age was not a significant factor in the decision. In short, the defendant's expert said that using that form of analysis, which he thought to be the more appropriate, the statistical evidence did not support an inference of age discrimination.

The plaintiff's expert then made additional studies to take account of veteran's preferences but using somewhat different techniques. Upon doing that, she still found statistically significant differences and then the defendant's expert then criticized the approach she showed and gave further explanations of why the Court should not give greater credence to that evidence.

I find that there is statistical evidence that supports an inference of age discrimination. It is not particularly strong evidence, but it is evidence that the Court must take into account.

In this particular case, the claim of age discrimination, however, cannot be supported. Even if there were some general age bias that was affecting, in some way, the reduction in force procedures, any such bias did not have role and did not play any part in Mr. Paetz's own situation.

The selection of his position for elimination is certainly not one that has any age related consideration attached to it. The only area in which one can look for possible improper behavior in this process is in why he was not allowed to bump Mr. Novack, and in the decision by the personnel office that he was not qualified or fully qualified to displace Mr. Novack. One might argue that there was a decision that could have been influenced by a bias against older persons, if

there were such a bias in existence there. The difficulty is that Mr. Novack was a year older than Mr. Paetz, and if there were any such age bias in that process of making that determination, that bias would have reflected in just the opposite result; namely, to have eliminated the older of the two employees, Mr. Novack, and allowed the younger of the two employees, Mr. Paetz, to have the position.

The Court's decision, after looking at the entirety of the evidence, giving weight and attention to the statistical evidence and the circumstantial evidence, but looking to the entirety of the matter, including the explanations by many who were involved in the decision as to how that was done, concludes that age was not a determining or influential factor in any degree in Mr. Paetz's being reduced from GS-15 to GS-12, or nine months later being terminated as the result of a reduction in force.

I next turn to the two non-ADEA claims. The first claim in count one is that there has been an unreasonable delay in finally resolving these claims. I have already indicated that that position is certainly understandable, given the length of time that this matter has carried on administratively or in the judicial system. However, mere years, alone, are not adequate and sufficient to show unreasonable delay.

I will not repeat each of the steps that has occurred in this arduous and, at times, tortuous process. Most of these are capsuled adequately in the decision of the Eleventh Circuit which reversed an earlier decision that had dismissed the case. The various steps that occurred occurred because Mr. Paetz was pursuing with vigor the full extent of his opportunities for review. Essentially, Mr. Paetz lost at each stage, except, at certain stages, about getting rehearings. That's about the only place at which he's ever won anything in this whole process.

It is that very limited success in terms of getting rehearings, through a variety of means, that really accounts for the delay that we have involved here. The delay is not really attributable to the defendant and its agencies' footdragging but to the persistence and at times success of the plaintiff in getting still further hearings.

There is a legal question of significance as to whether even if there was an unreasonable delay, what the remedy for that would be. I know of no case that would actually hold that in that situation that an employee would be reinstated or paid back pay. The analogous situations would seem to be that if an unreasonable delay were occurring, there might be a motion to require a decision or to mandamus the Court or to, in some way, to facilitate and speed up the process. I don't have to reach the conclusion or the decision as to what the remedy would be because I find there was no violation through any unreasonable delay on the part of the defendant.

The other non-ADEA claim involves the screening procedures that were followed or not followed, which includes a number of subsidiary issues that have been highlighted in plaintiff's brief. I have already mentioned a few of those. One of the principal items relates to the failure of Marshall to have ever had a position description for the job that Mr. Paetz held for almost three years, that of being of the electromechanical engineering branch in the Fab Lab.

The defendant has shown, however, that by filing standard form 58, any adverse impact upon Mr. Paetz for the failure of his file to contain that job description does not exist, because the standard form 58 that Mr. Paetz did file was a part of his record that was for review at such times as conducting the RIF and, indeed, according to the evidence before the Court that standard form 58, which reflected those duties and assignments was, in fact, reviewed by the personnel office in the process in conducting the RIF.

One particular job, the one held for approximately three months, does not appear to have been, as I understand the evidence, documented in the 201 file in any form at the time the '71 RIF was conducted, however, Mr. Paetz had the opportunity to have shown that information on the standard form 58 that he did file, which was filed, as I recall, on about December 6th or 7th of 1963, which was at the same time, he says, that he was actually performing the job of technical advisor and yet it was not shown on that standard form 58.

This Court does not sit, of course, as a super civil service board or as a super personnel board. In reviewing actions by federal employers that go through the merit selection review board — protection review board, this Court acts in a limited fashion. It's already been indicated that this is a review to be conducted, not de novo, but on the record.

There are thirty-two volumes in this record and the information stretches for about two feet. I have not gone through that record page by page. I have flipped at several volumes to see what is in there, but I have relied on the briefs of counsel, together with statement of agreed facts that was developed by counsel last year in deciding what is and what is not in that administrative record.

I find that the decision rendered in March, 1984, which was the final decision that is before this Court, was supported by supported by substantial evidence, and that is that there was a basis, a legitimate basis, for the personnel office to have reached the conclusion that it did; namely and most specifically, that Mr. Paetz was not fully qualified for the position of technical assistant in the Fab Lab in 1971.

I have heard a lot of evidence in this case as to whether he, in fact, was or was not fully qualified such as would have satisfied the regulations regarding bumping. I think, had the personnel office made just the opposite decision, namely, that he was qualified, fully qualified for that position, and, therefore Mr. Novack should have been separated, there would have been sufficient evidence to have supported that decision.

This is an area in which I think there was adequate evidence to support the personnel office in making either of those two determinations. This is matter in the area of judgment that must necessarily be exercised by in this type of undertaking. Were it I concluding on my own, de novo, if that had any significance, I think the majority of the evidence indicates that Mr. Paetz was qualified to have done the position, was fully qualified to have done the position. But that is a very close question. And I don't, as I view that, have to make that decision, or at least that fact, as I view it, is really not critical to any of the decisions I have to make. For if it

were, I would decide that he was qualified, fully qualified. And accordingly, trying to place oneself back into the position at the time, but armed with all of the facts that we now presently have, it would seem to me that the better decision probably would have been for Mr. Paetz to have bumped Mr. Novack. That is, however, a matter that was certainly debatable at the time. And I think the personnel office was well within its rights and obligations to make the decision that it did, which was the opposite.

There are a variety of matters that are raised in plaintiff's brief dealing with or attacking the procedure. I am not going to go through each of those.

In my view, the March, 1984 decision is due to be and will be affirmed. And I find it to be supported by substantial evidence to have been done consistent with law and regulations and not to have been an abuse of discretion or capricious or arbitrary.

That is the decision. I suspect this may not end this case. But in any event, it ends this stage.

Decision will be entered in favor of the defendant, denying the claims of the plaintiff.

Each side, however, will be directed to bear its own costs.

I'm not in any way asking, obviously, from the plaintiff for agreement with the decision or these findings. It may, however, be that there has been some factual matter that I have not addressed at all that either side might wish to address and make a ruling on. I obviously can do it better now than I could at a later point in time when memories fail or fade. If there is any matter that I have not addressed that you would specifically like me to address, I will be happy to do that at this time.

Mr. Lewis: The defendant has none.

Mr. Smith: We have none.

The Court: All right. Then the Clerk will enter judgment accordingly. Each side to bear its own costs.

STATE OF ALABAMA

MADISON COUNTY

I hereby certify that the preceding is a true and correct transcript from the record of proceedings in the above entitled matter held on May 12, 1988.

/s/ David W. Odom

David W. Odom

6-2-88

Date

A-19

Robert PAETZ, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 85-7346.

United States Court of Appeals,
Eleventh Circuit.

Aug. 11, 1986.

Appeal from the United States District Court for the Northern District of Alabama.

Before JOHNSON and HATCHETT, Circuit Judges, and ALAIMO*, District Judge.

HATCHETT, Circuit Judge:

The principal issue presented in this appeal is whether a civil service employee had an age discrimination claim pending on May 1, 1974, the effective date of the amendment extending the Age Discrimination in Employment Act to federal employees. Finding that the claim was pending, we reverse.

I. Facts

The appellant, Robert Paetz, is a rocket expert who came from Germany to the United States in 1945 to work with Dr. Wernher Von Braun. After serving under a "Special Contract for Employment of German Nationals with the War Department in the United States," Paetz became a citizen and a federal employee in the United States Civil Service. In 1971, Paetz was subjected to a reduction-in-force (RIF). The government downgraded him from the position of AST Launch Vehicle Project Management, GS-15, to the position

*Honorable Anthony A. Alaimo, Chief U.S. District Judge for the Southern District of Georgia, sitting by designation.

of AST Technical Management, GS-12. On July 12, 1972, Paetz's GS-12 position was terminated, and he was separated from the Civil Service. At the time of separation, Paetz was 63 years old and had accumulated 27 years of government service.

Paetz appealed both RIF actions to the Atlanta Regional Office, U.S. Civil Service Commission (CSC).[1] The Commission denied both appeals. Paetz then appealed these denials to the Board of Appeals and Review (BAR) of the CSC. On April 23, 1973, the BAR issued its final adverse decision on the second appeal. On February 18, 1974, Paetz filed a petition with the CSC to reopen and reconsider the decision of the BAR regarding the 1971 RIF. On June 11, 1974, the CSC denied the petition.

On February 12, 1975, Paetz filed an action in the United States District Court for the Northern District of Alabama seeking judicial review of the 1971 and 1972 RIF decisions. On February 1, 1977, the district court denied the government's motion for summary judgment and remanded the case to the CSC for a new hearing. On May 20, 1977, during a preconference hearing in the Atlanta Regional Office, the CSC treated both of Paetz's appeals as rescinded and agreed to incorporate the record of the 1971 and 1972 appeals in the new proceeding. This action is important to the disposition of this appeal.

On July 22, 1977, the CSC notified Paetz that the order of the Atlanta Regional Office of December 12, 1972, was rescinded and the case remanded. On April 6, 1978, the Atlanta office issued decisions adverse to Paetz on both RIFs.

On July 19, 1979, the MSPB rescinded both April 6, 1978, decisions and remanded the cases to the Atlanta office. On June 1, 1981, the Atlanta office decided the cases against Paetz. After an appeal by Paetz, in an order dated March 1, 1984, the MSPB modified and affirmed the 1981 decision of the Atlanta Field office. In the Order and Opinion, the

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[1]Subsequently, that office became the Atlanta Field Office, Federal Employee Appeals Authority, and is now the Atlanta Field Office, Merit Systems Protection Board (MSPB).

MSPB advised Paetz of his right to have the case further adjudicated.[2]

In Paetz's original appeal to the CSC, he raised issues relating to the operation of a reduction-in-force, i.e., the definition of competitive levels and bumping rights. Paetz complained that the method of defining competitive levels failed to provide protection to senior employees. In his February 18, 1974, petition for the CSC to reopen and reconsider the BAR's decision on the 1971 RIF, Paetz complained about three matters. He complained about (1) being denied a veteran's preference, (2) the use of narrow competitive levels, and (3) the use of a subjective qualification test resulting in discrimination against "senior employees causing them to forfeit their bumping rights." In his February 12, 1975, district court lawsuit seeking judicial review of the RIF decisions, Paetz alleged that the government made no effort to establish reasonable competitive levels or to protect his bumping rights "solely because of his age and years of service." The chronology of Paetz's case is set out in the margin.[3]

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[2] The order stated:

> The appellant may file a civil action in an appropriate U.S. District Court from the Board's final decision involving issues of prohibited discrimination. If such a civil action raises issues of discrimination based on race, color, sex, national origin, religion, or handicap, it must be received by the court no later than 30 days after the Board's decision or the issue of discrimination becomes final.

[3] 1. August 16, 1971 — notification of downgrading.
2. July 12, 1972 — separation from Civil Service.
3. October 15, 1971 — appeal of 1971 RIF action.
4. May 3, 1972 — denial of appeal of 1971 RIF action.
5. December 7, 1972 — BAR affirms decision.
6. June 30, 1972 — appeal of 1972 RIF action.
7. December 12, 1972 — denial of appeal of 1972 RIF action.
8. December 26, 1972 — appeal to the BAR.
9. April 23, 1973 — denial of appeal.
10. February 18, 1974 — petition with Civil Service Commission to reopen and reconsider decision of BAR in connection with 1971 RIF.
11. June 11, 1974 — petition to reopen and reconsider denied.
12. February 12, 1975 — action filed in U.S. District Court seeking judicial review of both RIFs.

II. Action in District Court

In Paetz's complaint in district court, he challenged the 1971 and 1972 RIF actions. The complaint alleges (1) that the administrative process was procedurally unfair because of delay in adjudicating the claim, (2) that Paetz was downgraded and terminated because of improper selection procedures, and (3) that Paetz was downgraded and terminated unlawfully because of his age and length of service, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1983).

The district court granted summary judgment for the United States. The court listed three grounds. First, Paetz never filed an administrative claim based on age discrimination. Second, if Paetz raised age discrimination in his RIF appeals, he did not have an administrative claim pending on the effective date of the 1974 amendments which extended the ADEA's coverage to federal employees. 29 U.S.C. § 633a (1983). Third, if Paetz claimed age discrimination in his RIF appeals and if claims were pending on the effective date of the 1974 amendments, he failed to file a lawsuit within the time allowed by the applicable statute of limitations.

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13. February 1, 1977 — district court denying government's motion for summary judgment and remanding the case to the U.S. Civil Service Commission for de novo hearing.
14. May 13, 1977 — prehearing conference in which parties agreed to incorporate record of 1971 and 1972 appeals in new proceeding; age discrimination identified as issue pertinent to both RIFs.
15. July 22, 1977 — CSC rescinds December 12, 1972, order denying appeal of 1972 RIF action.
16. September 28-29, 1977 — hearing on 1971 RIF case.
17. September 30, 1977 — hearing on 1972 RIF case.
18. April 6, 1978 — decisions adverse to Paetz issued by Atlanta Field Office.
19. July 19, 1979 — MSPB rescinds April 6, 1978, decisions and remands case to Atlanta Field Office.
20. June 1, 1981 — MSPB decides both cases adversely to Paetz.
21. March 1, 1984 — modified decision entered and made effective April 5, 1984.
22. April 4, 1984 — Paetz files civil action in United States District Court.

Paetz filed a Motion for New Trial or in the Alternative to Alter or Amend Judgment and Transfer Cause to the United States Court of Appeals for the Federal Circuit. On May 16, 1985, the district court denied the motion.

III. Issues

We must decide two issues: (1) whether the action is time-barred and (2) whether the district court has subject matter jurisdiction of Paetz's claim of age discrimination.

IV. Discussion

A. *Statute of Limitations*

Paetz filed this case within the statute of limitations period following the March 1, 1984, final decision. Limitations on claims against the United States do not commence to run until completion of the administrative process. *Zidell Explorations, Inc. v. United States,* 427 F.2d 735, 192 Ct.Cl. 331 (1970).

The government, however, contends that Paetz's lawsuit is time-barred because he filed the 1975 district court action late. The government seeks to set the commencement date for the statute of limitations as June 11, 1974, the date of the Civil Service Commission's final decision on Paetz's petition to reopen. The government argues that the thirty-day limit of 42 U.S.C.. § 2000-e16(c) should be applied to age claims where the claimant has pursued administrative proceedings and obtained a final decision. *See Lehman v. Nakshian,* 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981) (holding that Congress patterned certain ADEA provisions after Title VII of Civil Rights Act of 1964).

We need not determine the date on which the applicable statute of limitations began to run. A statute of limitations defense is an affirmative defense. *See* Rule 8(c), Fed.R.Civ.P. Failure to assert such a defense in a defendant's pleadings is a waiver. *See American National Bank v. FDIC,* 710 F.2d 1528 (11th Cir. 1983); *Jones v. Miles,* 656 F.2d 103, 107 n. 7 (5th Cir. Unit B 1981). The government did not plead a statute of limitations defense in 1975; the defense is waived.

B. *Subject Matter Jurisdiction*

Paetz contends that district court jurisdiction is based on 5 U.S.C. § 7703(b)(2) (appeal from a final order of the MSPB in age discrimination cases), and on ADEA 29 U.S.C. § 633a(c).

Without addressing whether 5 U.S.C. § 7703(b)(2) is a grant of jurisdiction, the government contends that the district court's jurisdiction only arises under ADEA 29 U.S.C. § 633a(c). The government argues that the district court lacks jurisdiction because Paetz did not have an age discrimination claim pending on May 1, 1974, the effective date of the ADEA amendments. The government cites *Bunch v. United States,* 548F.2d 336 (9th Cir. 1977) as support for this proposition. The government contends that because no allegation of discrimination is made, Paetz's claims is exclusively within the jurisdiction of the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295 and 5 U.S.C. § 7703(b)(1).

We agree with that portion of the government's argument which states that Paetz's petition to reopen a final decision did not destroy the finality of the CSC's decision and transform it into a "pending" claim. The Administrative Procedures Act deems administrative action final for purposes of judicial review regardless of whether a petition for reconsideration is presented to the agency. *See* 5 U.S.C. § 704; *see also Clark v. Goode,* 499 F.2d 130 (4th Cir. 1975) (racial discrimination; petition to reopen filed subsequent to a final decision of the CSC does not convert a finally adjudicated administrative claim into a "pending" claim). Paetz's claim was not reopened or revived by the CSC before May 1, 1974, and was not pending within the meaning of *Clark* on May 1, 1974. Paetz's position, therefore, is similar to the plaintiff's position in *Macellaro v. Goldman,* 643 F.2d 813 (D.C.Cir. 1980) (case closed before 1974 amendments not revived by post-1974 allegation of age discrimination).

Unlike the plaintiffs in *Clark* and *Macellaro,* however, Paetz received a final decision on the merits of his age discrimination claim through administrative processes on March 1,

1984, effective April 5, 1984.[4] Paetz cites 5 U.S.C. § 7703(b)(2) (procedure for an appeal from a final order of the MSPB in age discrimination cases) as authority for the filing of this suit. We agree that section 7703(b)(2), read with 5 U.S.C. § 7702(a)(3) supports the district court's jurisdiction.[5]

Bunch, which the government relies on, establishes that the pendency of a case either administratively or in the district court on May 1, 1974, is sufficient for ADEA jurisdiction to exist. The *Bunch court reasoned that the policies underlying Congress's extension of ADEA to federal civil service employees allow a generous reading of the jurisdictional requirement, based on a weighing of the relative injustice to the parties. The Bunch* court concludes that injustice will result if an employee who had a pending case on May 1, 1974, "cannot vindicate the longstanding policy against age discrimination in the federal competitive service." *Bunch,* 548 F.2d at 339. *See also* 548 F.2d at 336 n. 4 (describing legislative purpose as seeking mechanism to vindicate existing public policy against discrimination in civil service on the basis of age); *Womack v. Lynn,* 504 F.2d 267 (D.C.Cir. 1974) (describing rationale for retroactivity of employment discrimination claims in civil service as vindication through new remedy of longstanding right to be free of discrimination).

Bunch does not, as the government suggests, articulate a jurisdictional standard that excludes claims; it provides a

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[4]In contrast, Clark received a denial of a request to reopen; Macellaro sought to renew a claim terminated by an unappealed final order issued before 1974 by alleging in district court a continuing pattern of discrimination.

[5]As discussed below, our decision rests on construing Congress's intent in extending ADEA to the federal service. We need not decide whether sections 7702 and 7703 are an independent grant of jurisdiction, although we note that the Supreme Court has assumed that statutory language providing for judicial review of an administrative decision rendered after a hearing does create jurisdiction. *See Califano v. Sanders,* 430 U.S. 99, 108, 97 S.Ct. 980, 985, 51 L.Ed.2d 192, 201 (1977) (construing 42 U.S.C. § 405(b)). *See Green v. Heckler,* 742 F.2d 237, 239 (5th Cir. 1984) (assuming that final decision after a hearing is basis for judicial review).

Section 7702 provides that "[a]ny decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action . . . ."

framework for determining whether subject matter jurisdiction exists. The governing factor is congressional intent, determined by considerations of substantial justice. We must therefore consider whether the policy of Congress in extending ADEA to federal civil servants would be served by allowing Paetz to appeal the final order of the MSPB, and whether injustice would be manifest in allowing him to proceed. *See Bunch,* 548 F.2d at 339.

The equities favor Paetz. He filed his claim in 1971, without counsel, expecting a fair reading of his claim. He recited his years in service and described the special protections that exist in some civil services for senior civil servants. He discussed the lack of marketability of a 62-year-old engineer: "To find industrial employment now, at the age of 62, is practically impossible, it being well known that industry basically does not hire above age 45." When he petitioned for reopening on February 18, 1974, he complained of the use of a subjective qualification test resulting in discrimination against "senior employees."

Because of the procedural steps taken, Paetz's discrimination claim relates back to his original filing. At the prehearing conference on May 20, 1977, the government agreed to incorporate the record of the 1971 and 1972 appeals in the new proceeding. This case has been continuously active since its original filing. We conclude that the relation back in the hearings of the age discrimination claim to the original filings vests the district court with subject matter jurisdiction. Paetz's ADEA claim falls within the terms of *Bunch* as a case that was administratively pending on May 1, 1974.

We also agree with Paetz that the United States is too late in asserting its defense of lack of subject matter jurisdiction as to the prior lawsuit: we are now dealing with a new administrative record and a lawsuit resulting from the new record. The government's jurisdictional theory, which stops with the events of 1974, collapses under the weight of subsequent case history. We construe congressional intent to determine whether subject matter jurisdiction exists. Because fairness is a factor of determining the existence of ADEA jurisdiction under *Bunch,* the government's surprise

in this litigation helps resolve the jurisdictional question.[6] We must take into account the unfairness that would be manifest in denying Paetz access to court pursuant to the congressional enactment prohibiting age discrimination in the federal service.

Because the incorporation of the 1971 and 1972 records relates the ADEA suit back, substantial justice and common sense are served by recognizing that the congressional expansion of the civil servant's remedy for age discrimination encompasses this case. The provision in 5 U.S.C. § 7702(a)(3) for judicial review provides further evidence that Congress intended to create subject matter jurisdiction broad enough to cover a case such as this one.

We hold that the district court erred in dismissing Paetz's suit for lack of subject matter jurisdiction. In light of this disposition, we need not reach Paetz's argument that the court abused its discretion when it failed to transfer the case to the federal circuit. If for any reason the discrimination claims are defeated, we assume that the district court will again consider whether transfer is proper.

We reverse and remand for further proceedings.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

The majority, in its rush to don the robe of the chancellor in order to do equity in this case, ignores a fundamental proposition that underlies the system of both law and equity: a court may not legitimately decide a case unless it has subject matter jurisdiction. There is no question here but that the federal courts do not now have and never, in the course of

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[6]It likewise stretches common sense to argue that the 1977 remand was for naught, and the long, hotly contested administrative proceedings, in which the government participated without objection, should be considered as never occurring. It is the 1984 order on the merits of Paetz's claim that denied him relief. What the government could have argued or, more correctly, should have argued in the now distant 70's cannot "sandbag" this civil servant who has been continuously pursuing his claims since 1971.

this long controversy, had subject matter jurisdiction. For that reason I dissent from the majority's decision on the merits. Because I find that Paetz's age claim is not viable, I believe the proper disposition of this case requires only disposing of the pendent claims Paetz advances — which the majority pretermits.

I.

While I agree for the most part with the majority's statement of the case and its procedural history, I believe that the majority has overlooked several important matters that affect the outcome of the jurisdictional question.

First, the claim of age discrimination was not alleged in either of the original challenges to the reduction-in-force [hereinafter "RIF"] decisions made in 1971 and 1972. This is hardly surprising, since these claims were considered and rejected prior to the extension of the Age Discrimination in Employment Act [hereinafter "ADEA"], 29 U.S.C.A. § 621 *et seq.* (1985), to the federal workforce. It was only in February of 1974, just prior to the statutory modifications, that Paetz first raised the allegation of age discrimination in a petition filed with the Civil Service Commission [hereinafter "CSC"] seeking to reopen and reconsider the 1971 downgrade decision. That petition was denied.

Second, in February of 1975 Paetz filed suit in the United States District Court for the Northern District of Alabama seeking review of both the 1971 and 1972 RIF actions. His complaint alleged unreasonable delay in making an administrative determination, utilization of an unlawful select out procedure for RIFs, and challenged NASA's action as taken "solely because of his age and years of service." The government responded with a motion for summary judgment arguing, *inter alia,* that the court lacked subject matter jurisdiction on two counts: because at the time the cause of action accrued the government had not waived its sovereign immunity with regard to age-based discrimination; and because Paetz had failed to raise his age claim during the administrative appeal. R1-Tab 11-Exh. 3.

In February 1977, the trial judge to whom the case was then assigned denied the motion for summary judgment and remanded the matter to the CSC for a *de novo* hearing. R1-Tab 11-Exh. 1. That order did not, however, reach or decide the question of subject matter jurisdiction. In response to this direct court order, the CSC treated its earlier opinion as being rescinded and considered the question of age discrimination along with the other claims originally advanced in 1971 and 1972.

Following the conclusion of administrative review, with the issuance of the final decision of the Merit Systems Protection Board, this suit was sent back to the district court and transferred to the docket of Judge E. B. Haltom. The plaintiff there argued three counts: failure to adjudicate his claim within a reasonable time; downgrade and termination by means of an unlawful select out personnel policy; and downgrade and termination based on age-based discrimination. The government answered and subsequently filed a motion to dismiss, arguing that: 1) that the court lacked subject matter jurisdiction over the age discrimination claim because it was not pending on the effective date of the amendments to the ADEA; 2) that if there was jurisdiction it was only on the pendent claims and only in the United States Court of Appeals for the Federal Circuit;[1] and 3) statute of limitations.

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[1]In 1982 Congress passed the Federal Courts Improvement Act, 28 U.S.C.A. § 1295, which amended Title V of the U.S. Code dealing with court review of agency personnel actions. Under the current law, the garden variety appeal from a personnel decision of the Merit Systems Protection Board will lie only in the Court of Appeals for the Federal Circuit. 5 U.S.C.A. § 7703(b)(1). But when basic claims of adverse personnel decisions are blended with allegations of discrimination under the ADEA, this constitutes a "mixed case" and the Federal Circuit has no jurisdiction. *Id.* at § 7703(b)(2); *Williams v. Dep't of the Army*, 715 F.2d 1485, 1491 (Fed.Cir. 1983) (*en banc*). Such actions must be brought in the relevant district court and appealed to the circuit court above.

Appellant argues first that this case has a live discrimination claim, meaning that the court below was properly seized of jurisdiction, and alternatively that if the discrimination claim is not viable then this case should be transferred to the Federal Circuit. Thus the existence of subject matter jurisdiction by this Court turns on whether the appellant has a live claim of age discrimination.

The trial court elected to treat the motion to dismiss as a motion for summary judgment and took it under advisement after full briefs, affidavits, and oral argument. The trial court granted the motion for summary judgment in April 1984. Its order found that Paetz never filed an administrative claim of age discrimination, that even if he did, he had no claim pending on the effective date of the ADEA's enactment, and that even if the claim was pending the claim was time barred. In May of 1975 Paetz filed a motion for a new trial or to amend the judgment and to transfer the pendent claims to the Federal Circuit. That motion was denied. This appeal followed.

II.

A.

1.

In 1971 and 1972, when appellant was subject to the adverse personnel actions, Congress had not yet amended the ADEA to make it applicable to the federal workforce. As the majority holds, the amendments apply both prospectively and to all cases pending either administratively or before the courts on May 1, 1974. *Ante* slip op. at ___, at ___; *Bunch v. United States,* 548 F.2d 336, 338-40 (9th Cir. 1977). Thus Paetz may recover only if he can demonstrate that his claim was pending on May 1, 1974. If such claim was not pending, then he is without the scope of the amended statute and this Court has no jurisdiction to hear his complaint.

The government argues that Paetz had no claim pending at the relevant time. The administrative appeal he originally pursued raised claims based only on competition grades and bumping policies. Final determinations on both claims were rendered in early 1973, 5 C.F.R. § 772.307(c) (1972). This was over one year prior to the effective date of the ADEA amendments. It was only *after* Paetz petitioned the CSC to reopen his claim, two months prior to the effective date of the amendments, that the age claim was inserted. While that petition to reopen was pending in May, the government argues, it merely importuned the discretion of the CSC to

reconsider Paetz's claim; it did not destroy the finality of the administrative decision rejecting that claim. That petition was denied in June of 1974. The question then becomes whether the petition to reopen his claim puts Paetz in the position of having an action pending at the critical date.

Until today we have never passed on the question of finality in civil service claim determinations. However, as does the majority, I believe that the appellant had been given a final decision and had no claim pending for several reasons. First, I find persuasive the reasoning of two cases by other circuits considering analogous statutes. Once a final determination is rendered in a civil service matter, the subsequent filing to reopen the claim does not transform the case into one pending so as to bring that petitioner under the aegis of a recent statutory enactment. *Ellis v. Merit Systems Protection board*, 613 F.2d 49, 50 (3d Cir. 1980) (*per curiam*) (petition to reconsider filed before but denied after effective date of new act); *Clark v. Goode*, 499 F.2d 130, 132-33 (4th Cir. 1974) (mere fact that appellant had pending, before and after date amendments took effect, petitions to reopen an otherwise final decision not enough to bootstrap appellant under new statutory cause of action).[2] The original final determination by the CSC was just that. The petition to reopen did not give Paetz a cause of action under the new provisions.

Second, we can find an analogue in the provisions of the Administrative Procedures Act, 5 U.S.C.A. § 704. That Act provides that an administrative action is to be deemed final and subject to pursuit in the courts regardless of whether a petition to reopen and reconsider has been filed.

Third, logic compels finding that Paetz had no appeal pending. If we were to hold that the decision in 1973 was rendered non-final merely by the filing of a petition for rehearing, the effect would be that no decision of an administrative agency would ever be truly final. There would be no principled basis for preventing stale claims of ten or

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[2]*Cf. Macellaro v. Goldman*, 643 F.2d 813, 815-16 (D.C.Cir. 1980) (claim arising prior to ADEA amendments might be actionable but only if part of "chain of discriminatory acts" that continues past enactment date).

twenty or fifty years past from being reviewed and made subject to recent statutory causes of action. *Clark,* 499 F.2d at 133-34. Clearly Congress did not intend to make the various civil rights and discrimination acts retroactively applicable. But that would be the effect of holding for Paetz.

Since Paetz had no claim pending on May 1, 1974, I believe that Judge Haltom properly found that the trial court currently has no subject matter jurisdiction to consider his claim of age discrimination.

2.

Though the majority finds that Paetz had no claim pending in 1974, it takes away with the other hand that which it has just given. It finds dispositive the fact that the CSC subsequently reopened this matter and rendered a judgment on the merits of the age claim. I disagree.

The fundamental flaw in the majority's analysis is illustrated in the way it attempts to circumvent the holdings in *Clark* and *Macellaro.* It concedes that Paetz had no age claims pending in May of 1974, and holds that his *petition* to reopen the claim does not destroy the finality of the CSC's earlier rejection of Paetz's two appeals. But the majority then holds, *ante* slip op. at 4766-4767 & n. 4, at ___-___ & n. 4, that this case differs from *Clark* and *Macellaro* in that the CSC and its successor *actually reopened* the claim, permitted the insertion of the age claim, and then issued a final determination on that claim in March of 1984. *See also ante* slip op. at 4768, at ___.

Thus the new rule for this Circuit is that a petition to reopen does not affect the finality of the administrative decision unless the administrative review board accepts the petition and reopens the matter, at which point it is as if the action was filed for the first time. This is but a stalking horse constructed by the majority to achieve its desired result of giving Paetz relief. This reasoning fails because it is founded on a faulty premise — that the CSC on its own initiative elected to reopen Paetz's claim and to begin *de novo*. That is simply not supported by the record.

Truly, as the majority notes *ante* slip op. at 4768, at ___, the CSC did begin anew and did expressly incorporate all of the issues alleged in Paetz's earlier claims. And truly this action has been continuously contested since its filing. But it is hardly surprising that the CSC responded as the majority observes; the Commission was under a *direct* court order to do so. R1-Tab 11-Exh. 1. The CSC had previously evinced no interest in reopening Paetz's claims. It had consistently rejected them.

The majority's analysis skips over a perhaps subtle but nonetheless critical point: the trial court had no authority to order a rehearing *de novo.* By the majority's own analysis, Paetz had no cognizable claim to advance under the terms of the ADEA in May of 1974 (his claim deriving only from the subsequent order to reopen the matter). Without that, he may not invoke the subject matter jurisdiction of the federal courts to resolve a claim under that statute. *Bunch,* 548 F.2d at 340. Thus the trial court had no authority to direct the CSC to reconsider the merits of the claim under the new statutory standard. The whole subsequent course of these proceedings had as it source an order by the first trial judge that was clearly wrong. Accordingly, it furnishes no basis for a cause of action that did not otherwise exist. Judge Haltom properly recognized this and found that he had no jurisdiction.

Nonetheless, the majority presses on, finding a basis for relief premised on a blend of equity and estoppel. It cites to *Bunch,* 548 F.2d at 339, for the proposition that subject matter jurisdiction is to be found by an examination of congressional intent informed by "considerations of substantial justice." *Ante* slip op. at 4767, at ___. At its nub, the majority's position is that in extending the ADEA to federal workers Congress sought to excise discrimination from the employment context. Consistent with that purpose is a loose and expansive application of the amended ADEA even to cases that in reality arose prior to the extension of the Act if still pursued subsequently. In short, because the majority believes that Paetz has a colorable claim on the merits, it would be to commit "manifest injustice" to require him to

observe the niceties of the usual jurisdictional requirements. *See generally ante* slip op. at 4767-4768, at ___-___. As the majority observes, "We must take into account the unfairness that would be manifest in denying Paetz access to court. . . ." *Id.* slip op. at 4768, at ___-___.

This "legislative history *cum* equity" argument is a mischievous notion and it fails for two reasons. First, it is no mere shibboleth that a statute is not to be applied retrospectively absent clear evidence of congressional intent to the contrary. *United States v. Security Industrial Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982); *Brewster v. Gage,* 280 U.S. 327, 337, 50 S.Ct. 115, 117, 74 L.Ed.2d 457 (1930); *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed.2d 49 (1801); *Cox v. Schweiker,* 684 F.2d 310, 318-19 (5th Cir. Unit B 1982); 2 C. Sands, *Sutherland on Statutory Construction* § 4104, at 252 (4th ed. 1972 and Supp. 1985); *cf. Bradley v. Richmond School Board,* 416 U.S. 696, 711-12, 94 S.Ct. 2006, 2016-21, 40 L.Ed.2d 476 (1974) (absent evident congressional intent to the contrary, statutory amendment is presumed to apply to pending cases). Under both the looser standard of *Bunch* and the more traditional approach, there must be evidence of congressional intent to apply the ADEA amendments to cases having their source prior to 1974.

The majority makes vague references to congressional intent to apply this statute expansively, but its opinion is notable for its lack of citation to any portion of the congressional history. This is not surprising, for there is no such evidence. The provisions of the ADEA were extended to federal workers as part of the Fair Labor Standards Amendment of 1974. The legislative history of that revision is set forth at H.R.Rep. No. 913, 93d Cong., 2d Session, *reprinted in 1974 U.S. Code Cong. & Ad. News* 2811, 2825, 2849, 2860, and is devoid of any suggestion that the revisions are to be applied to claims arising before the effective date of the amendment.

Second, equity can do many things — chief among them minimize the harsh effect of rigid application of the law.[3] But even courts of equity cannot squarely abrogate positive law. 3 W. Blackstone, *Commentaries* *429. Few questions in American law are more squarely settled than that a federal court may not, under the constitutional grant of Article III, resolve a case unless seized of subject matter jurisdiction. *Stoll v. Gottlieb,* 305 U.S. 165, 171, 59 S.Ct. 134, 137, 83 L.Ed.2d 104 (1938) ("A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators."). Courts may not disregard this requirement even in the face of hardship or harsh result. *Mansfield, Coldwater & Lake Michigan R. Co. v. Swan,* 111 U.S. 379, 381-82, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884) (though it sometimes "seems to be an anomaly and a hardship . . . the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires the court, of its own motion, to deny its own jurisdiction, and . . . that of all other courts in the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which . . . it is called to act."); *Thompson v. Railroad Companies,* 73 U.S. (6 Wall.) 134, 137, 18 L.Ed. 765 (1867) (court in equity must not rule if at any point "plain defect of jurisdiction appears");

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[3]Of course, with the merger of law and equity in 1938, courts are no longer bound to observe all of the vestigial procedural distinctions between actions in law and in equity. F. James & G. Hazard, *Civil Procedure* 22 (2d ed. 1977). But assuming that jurisdiction in equity is still governed solely by the old common law rules, it is beyond cavil that even a court of equity may not pass on a controversy without first satisfying itself of the existence of jurisdiction over the subject matter presented. *See, e.g., Guaranty Trust Co. v. York,* 326 U.S. 99, 105-12, 65 S.Ct. 1464, 1467-71, 89 L.Ed. 1079 (1945) (federal court granting equitable remedy based on diversity); *DiGiovanni v. Camden Ins. Ass'n,* 296 U.S. 64, 69, 56 S.Ct. 1, 3, 80 L.Ed. 47 (1935) ("Whether a suitor is entitled to equitable relief in the federal courts, *other jurisdictional requirements being satisfied,* is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits. . . .") (emphasis supplied) (federal court in equity has federal question jurisdiction only if amount in controversy requirement met). This question has been settled since William the Conqueror created the court of exchequer, progenitor to the courts of equity, nearly nine centuries past. 3 W. Blackstone, *Commentaries* *44-46, *426.

Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127, 2 L.Ed. 229 (1804). Equity affords some flexibility to the application of law in order to effect substantial justice. But the majority's holding flexes the law past the breaking point. Equity simply cannot justify decision absent subject matter jurisdiction.

The majority also moors its opinion to an estoppel argument of sorts. It reasons that regardless of any errors of law by the trial judge in 1977, at this point "the United States is too late in asserting its defense of lack of subject matter jurisdiction as to the prior lawsuit: we are now dealing with a new administrative record and a lawsuit resulting from the new record." *Ante* slip op. at 4768, at ___. The majority is troubled, not unjustifiably, by the tremendous waste that would be engendered by finding "that the 1977 remand was for naught, and [that] the long, hotly contested administrative proceedings, in which the government participated without objection,[4] should be considered as never occurring." *Ante* at 4768 n. 6 at ___ n. 6. To hold otherwise, the majority concludes, is contrary to common sense. I agree and lament that this matter has resulted in a great waste of time and money for all concerned. But this was caused by the first trial judge who in 1977 acted without authority in ordering the rehearing *de novo*.

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[4]Despite the majority's contention to the contrary, the government clearly did raise the jurisdictional question in its motion for summary judgment in the original action in the district court in 1976:

> 1. As to claims numbered "2" and "3" . . . , plaintiff cannot recover as the United States had not waived sovereign immunity as to claims of age discrimination as of the dates of plaintiff's downgrading in 1971 and termination in 1972. Therefore, the Court is without jurisdiction as to these issues.
> 2. As to the claims numbered "2" and "3" . . . , plaintiff cannot recover on the issue of age discrimination and discrimination due to years of service for failure to raise these issues during his administrative appeal.

R-1Tab 11-Exh. 3.

The trial court disregarded this and proceeded to order the remand without passing on the jurisdictional question. The government can hardly be faulted for not continuing to press the point in the face of a square court order to the contrary.

Regardless of the error then committed, the majority simply compounds that error by perpetuating it through the application of estoppel. It errs for two reasons. First, it is hornbook law that a defect in subject matter jurisdiction may never be "too late" asserted.[5] Fed.R.Civ.P. 12(h)(3). Such a defect goes to the very legitimacy and propriety of federal court consideration. Whether or not the government actually raised the issue, and whether or not the first trial judge actually considered and found subject matter jurisdiction, is irrelevant because jurisdiction clearly did not exist. The doctrine of estoppel (or of issue preclusion which Paetz advances) cannot bind us to a prior determination of this question.

Second, even assuming that estoppel may apply, it is indisputable from the record that the government challenged subject matter jurisdiction right out of the box. Its motion for summary judgment was based, *inter alia,* on a challenge to jurisdiction because the plaintiff did not have a claim pending on the date the ADEA was extended and because he failed to allege an age claim in seeking administrative relief.[6] Inexplicably, the majority choose to ignore this fact.

In short, I am unable to join the majority's result. Regardless of the equities of the situation, Paetz has no right to relief; in granting him a remedy on grounds of equity and estoppel the majority upends nine hundred years of precedent to the contrary.

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[5]The only decision of which I am aware that may be taken to suggest even marginally that a jurisdictional defect may ever be "overlooked" is the opinion of Justice White for the Supreme Court in *Insurance Corporation of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee,* 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), a case premised on a factual setting far different from that instant — namely the Court found jurisdiction as a sanction for the defendant's failure to cooperate in discovery ordered to determine whether subject matter jurisdiction existed. The Court has never suggested that this small exception could or should be more broadly applied.

[6]*See* footnote 4, *supra.*

B.

There are still two pendent claims: improper administrative delay in adjudication; and improper use of select out procedures. These claims were presented to the trial court, but in granting the government's motion for summary judgment the trial judge failed to give them explicit consideration. He evidently believed that once the age claim was excised from this case the proper resolution of the pendent claims lay with the Federal Court, although he failed to order the case transferred to that court's docket. Appellant realleges these claims here and the government does not respond to them. The majority declines to consider them, leaving it to the trial court to determine whether a transfer is warranted depending on its disposition of the age claim upon remand.

This is no longer a "mixed case." Once the age claim washed out the court below properly declined to pass on the pendent claims because under current law they should be heard on direct appeal to the United States Court of Appeals for the Federal Circuit. 5 U.S.C.A. § 7703(b)(1). The fact that the law extant at the time this action was originally filed, 5 U.S.C.A. § 703 (1970), would have placed jurisdiction in the court below is of no consequence, for each court is bound "to apply the law in effect at the time it renders its decision. . . ." *Bradley,* 416 U.S. at 711, 94 S.Ct. at 2016; *see also Williams v. Department of Army,* 715 F.2d 1485 (Fed.Cir. 1983) (*en banc*) (applying provisions of Federal Courts Improvement Act to determine jurisdiction even though cause of action arose before effective date of Act). Because I believe that the age claim is not viable, and because under the currently applicable statute Congress has entrusted the pendent claims to the Federal Circuit, I would dispose of them by ordering this case transferred to that court for consideration on the merits.

For the reasons foregoing I am unable to join in the majority's disposition of this case. I dissent.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,
Plaintiff,

vs. CIVIL ACTION NO. 84-HM-5231-NE

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that Robert Paetz, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the order granting Defendant's motion for summary judgment entered in this action on the 24th day of April, 1985, and the order denying Plaintiff's motion for new trial or in the alternative to alter or amend judgment and transfer cause to the United States Court of Appeals for the Federal Circuit entered in this action on the 17th day of May, 1985.

SMITH, HUCKABY & GRAVES, P.A.

By: /s/ Robert Sellers Smith

Robert Sellers Smith
Attorney for the Plaintiff
223 Eastside Square, S.E.
Huntsville, Alabama 35801
(205) 533-5040

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,
Plaintiff,
vs. CIVIL ACTION NO. 84-HM-5231-NE
UNITED STATES OF AMERICA,
Defendant.

MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE TO ALTER OR AMEND JUDGMENT AND TRANSFER CAUSE TO THE UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT

Pursuant to Rule 59(a), FRCP, the Plaintiff moves the Court for a new trial and for grounds shows:

1. The Order of the Court dated April 24, 1985 pursuant to Defendant's motion for summary judgment is contrary to the facts in this case.

2. Said Order of the Court is contrary to the law in this case.

3. In the alternative, Plaintiff moves the Court to alter or amend its Order and transfer this cause the the United States Court of Appeals for the Federal Circuit.

DENIED

/s/ E. B. Haltom, Jr. 5/16/85

Judge Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,	)	
	)	
Plaintiff,	)	
	)	NO. CV
-v-	)	84-HM-5231-NE
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

ORDER

The above entitled civil action came before the Court upon motion of defendant for summary judgment in its favor at a summary judgment motion docket of this Court scheduled and held on April 23, 1985 commencing at 9:00 A.M. in the courtroom of the Federal Courthouse in Huntsville, Alabama. At the direction of the Court a federal court reporter was present throughout and all motion docket proceedings and oral arguments in each case in support of and in opposition to summary judgment were recorded.

Upon consideration of the motion for summary judgment, the Court is of the opinion that summary judgment is due to be granted herein in favor of defendant for the reasons dictated into the record by the Court during such motion docket proceedings. The Court expressly determines that there is no genuine issue of any material fact in this litigation, that defendant is entitled to judgment in its favor as a matter of law and that there is no just cause or reason for delay in entry of final judgment herein in favor of defendant. It is therefore

ORDERED and ADJUDGED that the motion of defendant United States of America for summary judgment in its favor in the above entitled civil action is hereby GRANTED

and ENTERED herein and that plaintiff Robert Paetz shall have and recover NOTHING of defendant in this action. Costs are taxed against plaintiff.

DONE and ORDERED this 24th day of April, 1985.

/s/ E. B. Haltom, Jr.

E. B. HALTOM, JR.,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

ROBERT PAETZ,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	NO.
vs.	)	84-HM-5231-NE
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

COMPLAINT

General Allegations

1. This is a suit for loss of wages, seniority rights, reinstatement, attorney's fees, allowable expenses, correction of Plaintiff's official personnel records, and other relief brought by Robert Paetz, a former employee of the Federal Government who was wrongfully, unfairly, and unlawfully downgraded and whose employment was terminated by the George C. Marshall Space Flight Center, National Aeronautics and Space Administration, an agency of the United States of America, after Plaintiff had completed 27 years of service. Jurisdiction of this Court is invoked pursuant to 28 USC §1491 to secure compensation for deprivation of rights secured by the due process clause of the Fifth Amendment of the Constitution of the United States, the Lloyd-LaFollette Act, 5 USC §7501, the Back Pay Act, 5 USC §5596, which guarantees nonprobationary Federal employees procedural fairness and protection from wrongful discharge, the Age Discrimination in Employment Act, 29 USC §621 et seq, and the Federal Personnel Manual.

2. Plaintiff was and is a citizen of the United States and of the State of Alabama. His address is Route 1, Box 418, Grant, Alabama 35747.

3. Plaintiff is one of the originial 118 member Rocket Team brought to the United States from Germany by Dr. Wernher Von Braun in 1945, under a "Special Contract for Employment of German Nationals with the War Department in the United States" (Paperclip Contract). In this capacity and thereafter as a Civil Service employee, Plaintiff rendered some twenty-seven years of uninterrupted, honorable service for Defendant, United States of America, in increasingly responsible positions of the United States Defense and Space Programs. (Redstone, Mercury, Jupiter, Saturn I, Saturn IB, and Saturn V).

4. Plaintiff was informed by Reduction-In-Force Notice dated August 16, 1971, and amended on September 1, 1971, that he had been selected for Reduction-In-Force Action. In lieu of separation, Plaintiff was downgraded from the position of AST, Launch Vehicle Project Management, GS-15, which grade he had held for 15 years, to the position of AST, Technical Management, GS-12, effective October 3, 1971.

5. Plaintiff's Civil Service position of AST, Technical Management, GS-12, was terminated, and he was separated from the Civil Service effective July 12, 1972.

6. Plaintiff has exhausted his administrative remedies, both as to the 1971 downgrading from GS-15 to GS-12, and as to his termination as a Civil Service employee in 1972.

7. The Merit Systems Protection Board decided Plaintiff's administrative case adverse to the Plaintiff on March 1, 1984 and stated therein that Plaintiff may file a civil action in an appropriate U.S. District Court from the Board's final decision. A copy of said Order of the Merit Systems Protection Board, dated March 1, 1984 is attached hereto marked Exhibit 1.

8. The aforesaid NASA action (and Merit Systems Protection Board action in affirming it) in downgrading Plaintiff in 1971 was arbitrary; was due to an abuse of discretion; and was not in accordance with law. It was without observance of procedure required by law and was unwarranted by the facts to the extent that the facts are subject to trial *de novo* by this Court.

Count One

9. Plaintiff incorporates herein by reference paragraphs 1 through 8 above.

10. Judgment herein for the release sought should be rendered in favor of Plaintiff due to the failure of the Government to adjudicate Plainitff's claim within a reasonable time and in support thereof, Plaintiff cites the following facts with respect to the administrative proceedings in his case:

(a) The administrative proceeding in Plaintiff's case was an adversary adjudication and had been pending without a final decision for in excess of twelve years at the time of the said Order of the Merit Systems Protection Board on March 1, 1984.

(b) A Summary of Major Actions, dated January 27, 1982, taken in the 1971 Reduction-In-Force action adverse to the Plaintiff beginning with the appeal of the Plaintiff of his downgrading from GS-15 to GS-12, dated October 15, 1971, is attached hereto marked Exhibit 2 and incorporated by reference. Said Summary of Major Actions originally appeared as a part of Plaintiff's motion to the Merit Systems Protection Board, Office of Appeals, for decision in favor of Plaintiff due to Government's neglect to adjudicate claim within a reasonable time. The motion also appears as part of Exhibit 2.

The 1972 Reduction-In-Force action, which separated Plaintiff from Government service, was appealed by Plaintiff June 30, 1972 and in general parallels the record dates described by said summary for the Reduction-In-Force 1971 action. Both cases were consolidated on appeal.

(c) Plaintiff's right to adjudication of his claims within a reasonable time has been violated due to inordinate delay and Government neglect as evidenced by the fact that the 1971 Reduction-In-Force appeal has stretched over a period of twelve years at the time of the filing of this complaint. The 1972 Reduction-In-Force action has stretched over a period of eleven years.

(d) The ability of the Plaintiff to prosecute his case has prejudicially diminished due to the long passage of time exceeding, as stated above, twelve and eleven years respectively from the two original appeals.

(e) Plaintiff has, without doubt, on a number of occasions, as evidenced by the attached Summary of Major Actions, established a prima facie case in support of both appeals. The burden, therefore, has been upon the Government for a period of many years to establish valid reasons to support the challenged adverse action.

(f) Due to the delay of the Government in securing final adjudication of Appellant's claim within a period in excess of twelve years and eleven years respectively from the time Plaintiff filed his original appeals, the Court should render a decision in both appeals in favor of the Plaintiff.

(g) Plaintiff's motion to the Merit Systems Protection Board, Office of Appeals, for decision in favor of Plaintiff due to Government's neglect to adjudicate claim within a reasonable time was itself pending without action before the Merit Systems Protection Board, Office of Appeals, for approximately two years. Said motion, dated January 27, 1982 and filed February 4, 1982, is attached hereto and marked Exhibit 2 as stated in paragraph 10(b) above. In support of said motion, Plaintiff filed a memorandum dated February 16, 1982.

11. This administrative "horror" began on August 16, 1971 when the Marshall Space Flight Center informed the Plaintiff, Robert Paetz, that he would be separated effective on October 2, 1971 from his position of Aerospace Technology (AST), Launch Vehicle Project Management, GS-861-15.

12. Plaintiff is entitled to a decision in his favor due to failure of the Government to adjudicate Plaintiff's claim within a reasonable time.

13. Wherefore, Plaintiff prays for judgment of this Court reversing the aforesaid actions of NASA and the Merit Systems Protection Board, and determining the appropriate redress, including loss of wages, seniority rights, reinstate-

ment, attorney's fees, allowable expenses, and appropriate correction of Plaintiff's official personnel record.

Count Two

14. Plaintiff incorporates herein by reference paragraphs 1 through 13 above.

15. Plaintiff was downgraded from GS-15 to GS-12 effective October 3, 1971, and his Civil Service career was terminated effective July 12, 1972, pursuant to an unlawful selecting-out procedure employed by NASA officials in violation of his fundamental rights as a career Civil Service employee. At the time of the 1971 downgrading, Plaintiff was 62 years of age and had completed 26 years of service; at the time of his termination, Plaintiff was 63 years of age and had completed 27 years of service.

16. The NASA officials at the Marshall Space Flight Center made no effort to enforce and protect Plaintiff's bumping rights or to establish and provide reasonable competitive levels for Plaintiff pursuant to Civil Service Commission regulations for his protection in connection with Reductions-In-Force.

17. The NASA downgrading action was based upon improper documentation of Plaintiff's official 201 file, which matter was seasonably brought to the attention of the appropriate NASA and Merit Systems Protection Board officials who wrongfully refused to take any appropriate action to correct said 201 file.

18. Said NASA downgrading action was based upon incorrect statements of fact contained in the following letters, the contents of which were, during the administrative appeal, wrongfully withheld from Plaintiff in spite of his request for such information:

FROM	TO	DATE	SIGNED
A&TS-MA-PMA	CSC-Atlanta	17 Mar 72	Riggs
S&E-PE-DIR	A&TS-MA-PMA/Mr. Boyd	16 Mar 72	Lindstrom
A&TS-MA-PMA	BAR/Mr. Berzak	12 Jul 72	Riggs
A&TS-MA-PMA	BAR/Mr. Berzak	19 Jul 72	Riggs

19. NASA, as stated in the CSC Atlanta Regional Office decision of May 3, 1972, a part of the administrative proceedings in this case, originally assigned as the reason for denying Plaintiff the right to bump into position 11408 (occupied by another GS-15 employee of lower retention sub-group than Plaintiff) that such position:

> " . . . requires primarily a Mechanical Engineering and/or Tool Engineering background. Over the years, Mr. Paetz has been primarily in the field of Electrical Engineering."

The above is completely false. Plaintiff was connected with the Saturn Booster programs from the beginning. The manufacturing, research, development, and manufacure of space boosters was the work of the Fabrication and Assembly Engineer Division (Laboratory) of which Plaintiff was Chief of the Electro-Mechanical Engineering Branch. Both Plaintiff's position and position 11408 were interdisciplinary between the fundamentals of electrical and mechanical engineering. The basic project of the Laboratory was the development of the booster stages for the Saturn I and Saturn V space vehicles in connection with the Apollo Program.

20. The aforesaid letters, listed in paragraph 18 above, were written by personnel with no direct knowledge of the facts and were wrongfully withheld from Plaintiff during his appeal thereby prejudicing his right to refute the incorrect statements of fact made in them, which facts were taken to be true and formed the basis of the original Civil Service Commission decision adverse to Plaintiff.

21. During the pendency of Plaintiff's appeal to the Civil Service Commission, the incumbent of position 11408 resigned voluntarily on June 29, 1972, only about 3 months after the critical Lindstrom letter and before the two letters of Mr. Riggs, Personnel Officer at Marshall Space Flight Center, which fact was known by the NASA officials and was brought, by the Plaintiff, to the attention of the CSC. Said agencies thereupon wrongfully refused to award the position to Plaintiff.

25. The person who wrote the decision for the Board of Appeals and Review, dated December 17, 1972, was apparently not familiar with Plaintiff's position involved in the appeal as the position, throughout the said decision, is described as "Aerospace Technical" and "Aerospace Technician." The correct description is Aerospace Technology (AST), which term is used for the new NASA position classification classes and series under the Classification Act of 1949, which classification classes were approved by the Civil Service Commission. The title *technician* is wrongfully used in several paragraphs of the decision. The term *technician* indicates a *skill*. The position is that of a professional engineer.

26. The NASA officials made no effort to establish reasonable competitive levels which inaction prejudiced the Plaintiff's rights and materially contributed to his 1971 downgrading. At said time, NASA established at Marshall Space Flight Center 303 Competitive levels for 340 employees in the grade GS-15. Of these so-called competitive levels, some 281 contained only one employee. Plaintiff was the only non-veteran employee in his competitive level at Marshall Space Flight Center. Marshall Space Flight Center arbitrarily has misused its authority for establishment of competitive levels by so expanding their number as to result in drastically reducing bumping rights of employees and to facilitate the center's "selecting-out" process. For example, in the years indicated, the Marshall Space Flight Center status of competitive levels was:

Year	Number of Competitive Levels	Number of Employees
1967	2300	7080
1971	2869	5600 approx.

27. Plaintiff's retention rights were prejudiced by NASA's excessive restrictions of his competitive level at the Mashall Space Flight Center. There were 430 GS-12 employees listed under the occupational Code NCC-700 (Aerospace Technology Types). They were represented by 218 competitive levels. If Marshall Space Flight Center had not arbitrarily diluted the number of competitive levels compared to the

number of employees as shown in paragraph 26 above, Plaintiff would have been grouped in the same competitive levels with other employees performing similar or identical duties, and Plaintiff would not have been reached for the Reduction-In-Force action in view of his 27 years of retention credit. In the 1972 Reduction-In-Force action, only 131 Marshall Space Flight Center employees were terminated out of 5500.

28. Had the NASA officials attempted to secure and enforce Plaintiff's rights, he would not have been terminated.

29. Plaintiff was downgraded and terminated pursuant to unlawful selecting out procedure in violation of fundamental rights.

30. Plaintiff incorporates herein by reference the prayer for relief contained at the end of Count One above.

Count Three

31. Plaintiff incorporates herein by reference paragraphs 1 through 30 above.

32. Plaintiff was downgraded and terminated unlawfully because of his age and length of service in violation of the Age Discrimination in Employment Act, 29 USC §629 et seq.

33. Plaintiff incorporates by reference the prayer for relief contained in Count One above.

/s/ Robert Paetz

Robert Paetz, Plaintiff
Route 1, Box 418
Grant, Alabama 35747

SMITH, HUCKABY & GRAVES, P.A.

By: /s/ Robert Sellers Smith

Robert Sellers Smith
Attorney for Plaintiff
223 East Side Square
Huntsville, AL 35801
(205) 533-5040

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent this date to the following parties:

National Aeronautics and Space Administration
Marshall Space Flight Center
Attention: Personnel Office
Huntsville, AL 35812

Office of the Secretary
Merit Systems Protection Board
1717 H Street, N.W.
Washington, D.C. 20419

NASA Headquarters
Program Management Division
Code OPM
Washington, D.C. 20456

Ms. Joan M. Blumberg
Commercial Litigation Branch
Civil Division
United States Dept. of Justice
Washington, D.C. 20530
Attn: Classification Unit
2nd Floor, Todd Bldg.

Ms. Susan L. Cloud
Attention: CC01
Marshall Space Flight Center
Huntsville, AL 35812

Office of Policy Analysis
Office of Personnel Management
Attention: Ms. Jeanette Neville
1900 E Street, N.W., Room 3508
Washington, D.C. 20415

Office of the Special Counsel
Merit Systems Protection Board
1365 Peachtree Street, N.E.
Atlanta, GA 30309

Date: April 4, 1984

SMITH, HUCKABY & GRAVES, P.A.

By: /s/ Robert Sellers Smith

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT PAETZ, appellant, v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, agency.	)	DOCKET NUMBERS AT035119003 AT03517800125

OPINION AND ORDER

This case is presently before the Board on appellant's request to reopen and reconsider[1] the decision of the Board's Atlanta Regional Office issued June 1, 1981.

Effective October 15, 1971, appellant was reduced in grade from GS-15 Aerospace Technology (AST) position to a GS-12 AST position as a result of a reduction in force (RIF) at the National Aeronautics and Space Administration (NASA), Marshall Space Flight Center (MSFC), Huntsville, Alabama. Then on July 12, 1972, appellant was separated from his GS-12 position in another RIF action at MSFC.

In his decision dated June 1, 1981, the presiding official considered the appeal of those two actions to the Board's Atlanta Regional Office on remand from earlier Board and federal court proceedings, adopted the analysis and findings established in the April 6, 1978, initial decisions in appel-

[1]Appellant's appeal arose prior to the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, effective January 11, 1979. Therefore, the law and regulations in effect at the time of the actions apply to the appeal. 5 C.F.R. § 1201.191; *Russell v. Department of the Navy*, 6 MSPB 585 (1981).

lant's cases concerning his procedural claims, and his competitive level, competitive area, and assignment claims, and concluded that there was no violation of appellant's rights under RIF regulations in either the 1971 or 1972 action. He then considered appellant's affirmative defense that the RIF actions discriminated against him because of his age, 62 at the time of the 1971 RIF.

Applying the order of proof for employment discrimination cases announced by the Supreme Court in *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973),[2] the presiding official found that appellant had not established a *prima facie* case of age discrimination with respect to the 1971 RIF because appellant did not show that he was treated differently by the agency from employees outside the protected group. The presiding official noted that appellant had proffered no evidence of age discrimination with respect to the 1972 RIF. He found, further, that even if appellant had established a *prima facie* case, the agency proved that its reason for conducting the RIFs was valid (budget reductions) and appellant did not show the reason was a pretext for a discriminatory decision.

In his request for reopening of this matter, appellant argues that the presiding official erred in finding that the evidence did not support a finding of age discrimination. The agency has responded in opposition to appellant's request. The Board hereby GRANTS appellant's reopening request pursuant to 5 C.F.R. §§ 772.310 and 772.312 (1972).[3]

---

[2]The principles of law established in *McDonnell-Douglas* serve as precedent for Age Discrimination in Employment Act (ADEA) cases. *See Loeb v. Textron,* 600 F.2d 1003 (1st Cir. 1979).

[3]Appellant contends that the presiding official erred in denying his request for a hearing on the issue of age discrimination. We find that the Board properly denied appellant's request. The presiding official complied with the Board's remand order of July 19, 1979, in giving appellant a choice of proceeding through interrogatories or a hearing and appellant choose to submit interrogatories. The presiding official properly found further that the testimony appellant sought was either not relevant or available from earlier hearings. We agree that appellant's request for a hearing constituted an attempt to expand the method and scope of discovery beyond the age discrimination issue. The Board also finds that

The record clearly shows that appellant was 62 years old at the time of the 1971 RIF and thus a member of the protected class under the Age Discrimination in Employment Act (ADEA).[4] Appellant submitted several NASA memoranda showing the agency's desire to hire and protect younger employees. Such memoranda create a clear inference that management's intent at the time of the RIF was to protect younger employees. *See Polstorff v. Fletcher,* 452 F. Supp. 17, 23 (N.D. Ala. 1978). Appellant also submitted a statistical report prepared by a sociologist consisting of several volumes of data analysis of MSFC employees affected by the 1971 RIF. Appellant contends that the statistical evidence reveals that employees 50 years and older were adversely affected by the 1971 RIF far out of proportion to their percentage in the total population at MSFC.[5]

The agency argues that the RIFs were mandated because of budgetary restrictions and that its internal memoranda reflect a legitimate management concern with maintaining a skilled work force. The agency also argues that appellant's statistics distort the RIF picture. The agency contends that veterans' preference and MSCF's career development program for engineers protected certain categories of employees regardless of age. The agency submits statistics which reflect the impact of these factors on the RIFs.

---

the presiding official properly denied appellant's request that the agency produce tables reflecting the age of employees affected by the two RIF actions. The presiding official properly found that such tables did not exist, that appellant had been provided the information available, and that the agency had no duty to compile information for appellant.

Appellant also contends that he was unable to submit evidence on age discrimination as to the 1972 RIF because the agency would not provide the information requested. The record reflects that the agency produced the information available as to the 1972 RIF.

[4]The Act protects workers who are between the ages of 40 and 70. 29 U.S.C. § 631(a).

[5]Appellant used 50 years and not 40 years as basis for computation. Appellant contends that the statistics show that while employees 50 years and older constituted about one-fourth (24.67%) of all employees at MSFC, they accounted for about two-thirds of all employees afffected (67.62%) in the 1971 RIF. *See* Appellant's Submission on Issue of Age Discrimination, Vols. I and II.

The Board finds that appellant established a *prima facie* case of age discrimination with regard to the 1971 RIF under *McDonnell-Douglas, supra,* but not with regard to the 1972 RIF. The agency established that both RIFs were validly undertaken for budgetary reasons. Also, the agency's designation of formal trainee positions occupied by younger agency employees is a matter of agency discretion. The decision to preserve or abolish certain positions in a RIF is also a discretionary management consideration. *See Griffin v. Department of Agriculture,* 2 MSPB 335, 336-337 (1980). We agree with the presiding official's finding that the statistics offered by appellant do not establish that the proper basis for the 1971 RIF was a pretext for age discrimination, and that a significant number of employees outside the protected group were also affected in the two RIFs at issue. We conclude therefore that the agency underwent these RIFs for valid reasons, that it complied with RIF procedures, that appellant's rights were not violated thereunder, and that appellant did not establish his affirmative defense of age discrimination.[6]

Accordingly, the initial decision issued June 1, 1981, is hereby AFFIRMED as MODIFIED herein.[7]

---

[6]In addition to his request for reopening, appellant filed a motion for a decision in his favor on the basis that the government failed to adjudicate his claim within a reasonable time. The Board finds this motion to be without merit. We note several factors for the delay. First, eight administrative decisions have been issued in appellant's cases and appellant has exhausted his administrative appeal rights in each instance. Further, appellant pursued his right to file in the federal court system. Appellant should not complain over a lengthy process which he has elected to pursue. Further, appellant precipitated delays in requesting several extensions of time to file pleadings, in filing motions and objections to the agency's submissions, and in failing to serve copies of pleadings on the agency. The Board finds that, considering these factors, the length of time in adjudicating this case has not been unreasonable to the point of prejudicing his constitutional due process rights.

[7]Appellant has also filed a Motion for attorney fees. The Board has no provision in pre-Civil Service Reform Act cases for an award of attorney fees. *See Nibali v. United States,* 634 F.2d 494 (Ct. Cl. 1980). In any event, appellant has never been a "prevailing" party. *See Hodnick v. Federal Mediation and Conciliation Service,* 4 MSPB 431 (1980).

Appellant also argues that the presiding official erred in finding that he raised his age discrimination claim for the first time in federal court. The

There is no further right of administrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. This case is considered to be closed by the Board since all administrative appeal rights have been exhausted.

This is a preliminary decision of the Merit Systems Protection Board. The appellant may petition the Equal Employment Opportunity Commission (EEOC) to review the Board's preliminary decision on any issue of prohibited discrimination no later than 35 days after the issuance of this decision. Such petition must be filed in writing with the Office of Review and Appeals, EEOC, 2401 E Street, N.W., Washington, D.C. 20506. If the appellant does not file a petition for review with EEOC within this time limit, the Board's preliminary decision shall be come final. In the event that a petition for review is filed with EEOC, this decision shall become final on all issues, other than issues of prohibited discrimination, on the date EEOC's decision on the issues of discrimination becomes final.

The appellant may file a civil action in an appropriate U.S. District Court from the Board's final decision involving issues of prohibited discrimination. If such a civil action raises issues of discrimination based on race, color, sex, national origin, religion, or handicap, it must be received by the court no later than 30 days after the Board's decision on the issue of discrimination becomes final.

FOR THE BOARD:

MAR 1 1984	/s/ Robert E. Taylor
(Date)	Robert E. Taylor, Secretary

Washington, D.C.

Board finds no significance of this argument in light of the fact that the Board has considered the claim.

Appellant argues that the presiding official erred in adopting findings from prior Board decisions in this case in his initial decision of June 1, 1981. This argument is without merit since the incorporation by reference represented the same findings in a new adjudication of the pertinent issues.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opinion and Order was sent by certified mail this date to:

Mr. Robert Paetz
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Grant, Alabama 35747

by regular mail to:

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Mr. Lawrence F. Watson
Attention: CC01
Marshall Space Flight Center
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National Aeronautics & Space Administration
Marshall Space Flight Center
Attention: Personnel Office
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NASA Headquarters
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by hand to:

Office of Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Room 818
Washington, D.C. 20419

_____ _____

(Date)

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF APPEALS

ROBERT PAETZ

vs.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

Initial Decision Number ATO35119003

APPELLANT'S MOTION FOR DECISION IN FAVOR OF APPELLANT DUE TO GOVERNMENT'S NEGLECT TO ADJUDICATE CLAIM WITHIN A REASONABLE TIME

Comes now Appellant, Robert Paetz, and moves the Merit Systems Protection Board, Office of Appeals, to render a decision herein in favor of the Appellant due to the failure of the Government to adjudicate Appellant's claim within a reasonable time and in support thereof shows as follows:

(1) The proceeding herein is an adversary adjudication and has been pending without a final decision herein for in excess of ten years.

(2) A summary of the major actions taken in the 1971 RIF action adverse to the Appellant beginning with the appeal of the Appellant of his downgrading from GS-15 to GS-12, dated 15 October 1971, is attached hereto and incorporated by reference.

The 1972 RIF action, which separated Appellant from Government service, was appealed by Appellant 30 June 1972 and in general parallels the record dates described in said summary for the RIF-1971 action. Both cases have been consolidated on appeal.

(3) Appellant's right to adjudication of his claims within a reasonable time has been violated due to inordinate delay and Government neglect as evidenced by the fact that the 1971-RIF appeal has stretched over a period of ten years and at the time of the filing of this motion, no final decision has been rendered. The 1972-RIF action is

now rapidly approaching the age of ten years without any final decision having been rendered.

(4) The ability of the Appellant to prosecute his case has prejudicially diminished due to the long passage of time exceeding, as stated above, ten years from the original appeal.

(5) Appellant has, without doubt, on a number of occasions, as evidenced by the attached "Summary of Major Actions," established both a substantial and prima facie case in the support of both appeals. The burden, therefore, has been upon the Government for a period of many years to establish valid reasons to support the challenged adverse actions.

(6) Due to the failure of the Government to secure final adjudication of Appellant's claims within a period of approximately ten years from the time Appellant filed his original appeals, the Merit Systems Protection Board, Office of Appeals, should render a decision in both appeals in favor of the Appellant.

WHEREFORE, Appellant moves the Merit Systems Protection Board, Office of Appeals, to enter a decision in both appeals in favor of the Appellant reinstating Appellant to a GS-15 at Marshall Space Flight Center and awarding to Appellant all back pay and seniority rights which he would have acquired had he encumbered a GS-15 position at all times since the 1971 Reduction-in-Force.

DATED this 27 day of January, 1982.

Respectfully submitted,

SMITH, HUCKABY & GRAVES, P.A.

By /s/ Robert Sellers Smith

Robert Sellers Smith
Attorney for Appellant
223 East Side Square
Huntsville, Alabama 35801
(205) 533-5040

A-60

SUMMARY OF MAJOR ACTIONS

15 OCTOBER 1971 - 7 OCTOBER 1981
in
ROBERT PAETZ VS. MSFC-NASA

RIF - 1971 AND RIF - 1972 APPEALS AND
COURT CASES TO REGAIN EMPLOYMENT

Appellant: Robert Paetz
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Counsel for Appellant: Robert Sellers Smith
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I. RIF - -1971

THE GEORGE C. MARSHALL SPACE FLIGHT CENTER (MSFC) DOWNGRADED APPELLANT FROM GS-15 TO GS-12, EFFECTIVE 3 OCTOBER 1971.

II. RIF - 1972

MSFC SEPARATED APPELLANT FROM SERVICE, EFFECTIVE 12 JULY 1972. (THE RIF - 1972 CASE APPEAL TO THE ATLANTA FIELD OFFICE BEGAN 30 JUNE 1972. THE DECISION OF CSC, ATLANTA, WAS 12 DECEMBER 1972; APPELLANT'S APPEAL TO BAR WAS 26 DECEMBER 1972; AND THE DECISION OF BAR WAS 23 APRIL 1973. THE REMAINDER OF THE 1972 RIF ACTION, IN GENERAL, PARALLELS THE RECORD DATES DESCRIBED HEREIN FOR THE RIF - 1971 ACTION.)

Date	Action
I. RIF - 1971 DOWNGRADING GS-15 TO GS-12.	
15 Oct 71	Appeal of downgrading GS-15 to GS-12 to U.S. Civil Service Commission (CSC), Atlanta Region. (Official Record, pages 779 through 790 and enclosures thereto, hereinafter: Record, page)
3 May 72	Adverse Decision by U.S. CSC — Atlanta Region. (Record, p. 164-167)
29 Jun 72	Appeal of Adverse Decision by U.S. CSC — Atlanta Region to: U.S. CSC — Board of Appeals and Review (BAR) Washington, D.C. (Record, p. 644-651 and enclosures thereto)
7 Dec 72	Affirmation of Adverse Decision by U.S. CSC — BAR. (Record, p. 140-144)
18 Feb. 74	Petition to the Commissioners to reopen and reconsider the decision of the Board of Appeals and Review, to the: Honorable Robert E. Hampton, Chairman U.S. Civil Service Commission Washington, D.C. (Record, p. 87-101 and enclosures thereto)
18 Mar 74	Appellant's trip (17-19 Mar 1974) with counsel, R. S. Smith, to Washington, D.C., and meeting with: Mr. Robert B. Bates, Assistant to the Commissioners (Appeals) in the Office of the Chairman, U.S. Civil Service Commission, to discuss appellant's petition of 18 Feb 74 and to review the appeal file.

Date	Action
	Upon reviewing the appeal file, appellant found and received copies of four "counterclaim" letters originated at MSFC and not previously made known to appellant. Appellant, in his letter dated 29 Jun 72 to the BAR, U.S. CSC, Record, pages 644 through 651, had requested these "counterclaims." However, appellant was never furnished them. The specific requests for these counterclaims are contained on Record, pages 644-649.
23 Apr 74	Letter from appellant to Dr. William R. Lucas, Deputy Director, George C. Marshall Space Flight Center (MSFC), re: Appellant's Petition to Chairman, U.S. Civil Service Commission, to reopen and reconsider appellant's case. Request for official withdrawal of the four erroneous counterclaim letters issued by officials of MSFC. Request for correction of appellant's 201 Personnel File. (Record, p. 11-32 and enclosures thereto)
10 May 74	Letter from Dr. W. R. Lucas, Deputy Director, MSFC, to R. S. Smith, Counsel for Appellant: Dr. Lucas denies all representations of appellant and upholds all documents issued by MSFC. Appellant challenges the correctness of Dr. Lucas' statements. Appellant was denied Dr. Lucas as a witness in the hearings and was denied answers to questions directed to Dr. Lucas in letters by

Date	Action
	appellant's attorney, in spite of many requests. (Record, p. 7)
11 June 74	Letter from Robert B. Bates, Assistant to the Commissioners (Appeals), U.S. Civil Service Commission, to Mr. R. S. Smith, Counsel for Appellant: Mr. Bates, citing the letter of Dr. W. R. Lucas of MSFC, dated 10 May 74, denied appellant's petition to reopen and reconsider the case. (Record, p. 1-2) Appellant's petition to reopen and reconsider his case, which included 12 attachments, contained extensive documentation of appellant's representations that there was incorrect, incomplete and missing documentation in his Official 201 File (Personnel File). However, the denial was based exclusively on the erroneous letter of Dr. W. R. Lucas, which Mr. Bates did not question. Dr. Lucas' letter damaged appellant enormously in that: Appellant's correct representations, supported by sufficient official documentation, were denied. Appellant's 201 Personnel File, containing incorrect documentation issued by MSFC, was not corrected, and missing documentation as to actual assignments and responsibilities was not issue. Appellant was not reinstated in an equitable GS-15 position at MSFC.

Date	Action
	Appellant was unable to apply for jobs in his field of aerospace engineering in private industry. Private industry in the aerospace engineering field, working under contract for the government, is required to obtain security clearance for its employees. Any background investigation of a prospective applicant/employee which reveals inconsistency between statements of the applicant and documentation in his personnel file of his former agency (emphasized by the Deputy Director's letter of 10 May 1974) results, unquestionably, in not hiring the applicant. Appellant has been denied possible employment by industry of approximately ten (10) years' duration.
12 Feb 75	Plaintiff's (Appellant's) Complaint, CA 75 G 0167 NE, filed in the United States District Court for the Northern District of Alabama, Northeastern Division, Re: RIF - 1971 Downgrading, GS-15 to GS-12, combined with the RIF - 1972 Separation From Service.
14 Apr 75	Defendant's First Motion to Dismiss
10 Jul 75	Defendant's Second Motion to Dismiss
13 Aug 75	Defendant's Motion for Summary Judgment
15 Mar 76	Counsel for appellant requested the Official Record of the Administrative Proceedings from: Robert E. Hampton, Chairman, U.S. Civil Service Commission

Date	Action
25 Mar 76	Letter form U.S. CSC, Office of the General Counsel, to R. S. Smith: " . . . CSC has forwarded those records to the U.S. Attorney's Office. . . . " requests for the administrative records should be made to him."
7 Apr 76	Counsel for appellant requested the Official Administrative Proceedings from: Mr. Henry Frohsin, Assistant U.S. Attorney Office of U.S. Attorney Northern District of Alabama Federal Courthouse Birmingham, Alabama
17 May 76	Wayman G. Sherrer, U.S. Attorney, filed the certified Record of the Administrative Proceedings with: The U.S. District Court for the Northern District of Alabama, Northeastern Division, and with: R. S. Smith, Counsel for Appellant.
16 Jun 76	Plaintiff's Memorandum of Alleged Errors of Record in the Case: Robert Paetz, Plaintiff vs. William R. Lucas, Director MSFC-NASA, and Robert E. Hampton, Chairman, U.S. CSC, defendants CA 75 G 0167NE Filed with: U.S. District Court for the Northern District of Alabama Northeastern Division

Date	Action

The Memorandum documents plaintiff's representations that there was incorrect, incomplete and missing documentation in his Official 201 file (Personnel File), which was the basis of NASA's downgrading and reduction-in-force actions against him.

The Memorandum lists and describes the significant and numerous errors and omissions committed by personnel of MSFC, including Dr. W. R. Lucas through his erroneous letter dated 10 May 1974.

Plaintiff's correctness of representations made in plaintiff's Memorandum of Alleged Errors of Record are supported by the 41 enclosures thereto.

The Memorandum, dated 16 June 1976, contains, in paragraph 10, pages 14 through 16, a description of correct and complete documentation of personnel records made in accordance with Civil Service Regulations. (In this example the Department of the Navy supplied the documentation in connection with the transfer of a Civil Service employee to plaintiff's Electro-Mechanical Engineering Branch at MSFC.)

Plaintiff's letter to Dr. William R. Lucas, Deputy Director, George C. Marshall Space Flight Center, two years earlier, on 23 April 1974, provides additional documentation by plaintiff of the improper MSFC documentation in his Personnel File and the correctness of his representations as to that improper documentation. Plaintiff's letter to Dr. Lucas contains 20 pages and is supported by 6 attachments and 7 appended letters, including the

Date	Action
	18 February 1974 petition to Robert E. Hampton, Chairman, United States Civil Service Commission.
	Witnesses at the RIF - 1971 hearing, dated 28/29 September 1977 supported plaintiff's position that there was incorrect documentation in his Personnel File. One of the witnesses, James H. Robinson, testified that two Form 50s describing Jobs A-3644-S and A-2113-S, which were documents in plaintiff's Official 201 file, were "incorrect" and did not describe plaintiff's job from 1960 to 1963 as Chief of the Electro-Mechanical Engineering Branch.
	The first of these documents, dated 1 July 1960, with attached Job Descriptions A-3644-S, describes plaintiff's position as being that of "Branch Chief, Electrical Engineering Branch" within the Fabrication and Assembly Engineering Division. (Record, p. 804-807)
	The second, dated 7 July 1960, with attached Job Description A-2113-S, describes plaintiff's position as being that of "Section Chief, Electrical Engineering Section" within the Fabrication and Assembly Engineering Division. (Record, p. 809-812)
	Plaintiff's note: Job Descriptions A-3644-S and A-2113-S were plaintiff's former jobs under the Army Ballistic Missile Agency and, as Witness Robinson states, were "incorrect" and did not describe plaintiff's job as Chief of the Electro-Mechanical Engineering Branch. In fact, the organizations listed as A-3644-S and A-2113-S never existed at the George C. Marshall Space Flight Center.

Date	Action
	Mr. Robinson, who worked under plainitff in the Electro-Mechanical Engineering Branch, described the mission of the branch and plaintiff's responsibilities as chief. (See Transcript p. 400-405.) Other witnesses (workers and co-workers) substantiated Mr. Robinson's testimony. Plaintiff asserts that the significant and numerous errors and omissions in personnel documentation were caused not only by the neglect of lower level personnel documentation, but by MSFC top management policy decisions not to issue position descriptions for a number of years, in total disregard of NASA and Civil Service Regulations. Plaintiff considers correct and complete personnel documentation mandatory for employees in obtaining future employment, which is vital for the subsistence of their families. Plaintiff suggests that the MSPB carefully analyze plaintiff's Memorandum of Alleged Errors of Record and enclosures thereto, as well as the above-mentioned letter to Dr. W. R. Lucas, dated 23 April 1974, and the Petition to the Commissioners, dated 18 February 1974.
1 Feb 77	Court order issued by the U.S. District Court for the Northern District of Alabama, Northeastern Division, as follows: "ORDER " . . . It is further ORDERED that this case is REMANDED to the Civil Service Commission for a de novo hearing and the United States Government is ORDERED to present Mr.

Date	Action
	Robert E. Lindstrom and Mr. Howell E. Riggs for examination. "Done this 1st day of February 1977. "(Signed:) J. Foy Guin, Jr. "United States District Judge"
13 May 77	Prehearing Conference at MSFC. Presiding: Mr. Ira R. Harrison, Appeals Officer Federal Employee Appeals Authority U.S. Civil Service Commission, Atlanta Region 1340 Spring Street, N.W. Atlanta, Georgia 30309.
28/29 Sep 77	Hearing of the RIF - 1971 Downgrading case which began 3 Oct 71. Presiding: Mr. Ira R. Harrison, Appeals Officer. (The proceedings of the hearing are contained in the Transcript, pages 1 through 434.) POSTHEARING SUBMISSIONS RIF - 1971
24 Oct 77	Affidavit of Robert Paetz re: Testimony of Witness William J. Franklin, Jr. (2 pages)
10 Nov 77	Affidavit of Dwain T. Walters re: Testimony of Witness William T. Franklin, Jr. (2 pages, 1 enclosure)
20 Feb 78	Letter, from R. S. Smith, Counsel for Appellant, to Mr. Ira R. Harrison, U.S. CSC, Atlanta, re:

Date	Action
	Advisory opinion by Mr. Gordon Pressley, Chief, Staffing Division, Atlanta Regional Office and testimony by the following witnesses: Mr. Robert Lindstrom Mr. Dwain T. Walters Mr. Charles H. Meyers Mr. James H. Robinson (Letter, 20 Feb 78, p. 1-9) Enclosure to 20 Feb 78 letter: Paetz vs. MSFC, RIF - 1971, containing appellant's comments to the testimony of Witness Mr. Robert Lindstrom. (3 pages)
6 Apr 78	Affirmation of MSFC's downgrading decision by U.S. CSC, Federal Employee Appeals Authority, Atlanta Field Office. Decision Number ATO 35180124 Signed: Ira R. Harrison, Appeals Officer
8 Sep 78	Appeal of Mr. Robert Paetz from the Decision of the Federal Employee Appeals Authority, Atlanta Field Office. Decision Number: ATO 35180124 Decided on Apr 6 78 RIF - 1971 Downgrading case. The Appeal Brief was submitted in duplicate to: Ms. Peggy S. Griffiths, Chairman Appeals Review Board U.S. Civil Service Commission Washington, D.C. The brief consists of 7 introductory pages, pages i through 67, and attachments 1 through 31.

Date	Action
19 Jul 79	Decision by the Merit Systems Protection Board (MSPB), Office of Appeals Review, Washington, D.C., Combining the RIF - 1971 Downgrading and the RIF - 1972 Separation from Service. The MSPB RESCINDS the 6 Apr 78 decision of the Atlanta Field Office and REMANDS the appellant's cases to that office for further proceedings consistent with the decision: ". . . relative to the age-discrimination issue. . . . "For the Board: Cameron C. Smith "Acting Director, "Office of Appeals Review"
31 Mar 80	Appellant's submission on the issue of age-discrimination, RIF - 1971 and RIF - 1972, to: Mr. Earl Witten Merit Systems Protection Board, Atlanta Region The submission, forwarded in duplicate, consists of: Volume I: (160 pages) and: Title page, 7 introductory pages and 3 attachments Report by Dr. Rosanna H. Chang, dated 31 March 1980 entitled: "Statistical Data Analysis of George C. Marshall Space Flight Center, Employees Adversely Affected in the 1971 Reduction in Labor Force" with: Title page and pages 1 through 146. Volume II: (170 pages) consisting of: Appendices A through E.

Date	Action
1 Jun 81	Adverse Decision by U.S. MSPB, Atlanta Field Office. Initial Decision Number ATO 35119003 "The reduction-in-force actions are affirmed. "(signed:) S. F. Vesser "Presiding Official"
7 Oct 81	Appellant's Brief — Age Discrimination Issue Initial Decision ATO 35119003 to: Office of the Secretary, Merit Systems Protection Board, Washington, D.C. The brief consists of: 4 introductory pages and Pages 1 through 52. Exhibits 1 through 5, marked pages 53 through 96.
25 Nov 81	Appellant's Motion for Attorney's Fees and Other Expenses Pursuant to the Equal Access to Justice Act in: Robert Paetz vs. NASA Initial Decision ATO 35119003 The motion consists of: Letter of Transmittal Motion, four pages Exhibit 1: Public Law 96-481, Oct. 21, 1980 Exhibit 2, 123 pages: Summary of Legal Expenses of Robert Paetz 1971 through 31 October 1981, in Robert Paetz vs. NASA: RIF - 1971 and RIF - 1972 Appeals and Court Suit to Regain Employment. Filed with: Office of the Secretary Office of Appeals Merit Systems Protection Board 1717 H Street, N.W. Washington, D.C. 20419

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent this date to the following parties:

National Aeronautics and Space Administration
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Huntsville, Alabama 35812

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Mr. Lawrence F. Watson
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Date: January 28, 1982.

/s/ Robert Sellers Smith

Robert Sellers Smith, Attorney for Appellant, Robert Paetz
SMITH, HUCKABY & GRAVES, P. A.
223 East Side Square
Huntsville, Alabama 35801
(205) 533-5040

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF APPEALS

ROBERT PAETZ

vs.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

Initial Decision Number ATO35119003

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION FOR DECISION IN FAVOR OF APPELLANT DUE TO GOVERNMENT'S NEGLECT TO ADJUDICATE CLAIM WITHIN A REASONABLE TIME

This memorandum is submitted in support of Appellant's motion dated January 27, 1982, for a decision by the Office of Appeals, Merit Systems Protection Board, in this case.

(1) APPELLANT HAS BEEN DENIED HIS RIGHT TO TIMELY ADMINISTRATIVE PROCEEDINGS. The Administrative Proceedings Act, 5 U.S.C. §555(b) states in part:

> . . . with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

There is a long line of cases based on this statute. In *Deering Milliken vs. Johnston,* 295 F.2d 856 (1961), the Court of Appeals for the Fourth Circuit held that the Agency is required under the Act to conclude an administrative appeal within a reasonable time.

In *Nader vs. F.C.C.,* 520 F.2d 182 (1975), the court found that the Federal Communications Commission's failure to expedite inquiry into reasonableness of prices and earnings of a phone company's manufacturing subsidiary for greater than ten years from the institution of the inquiry indicated a breakdown of regulatory process which violated the administrative rights of the phone company.

In *Silverman vs. NLRB,* 543 F.2d 428 (2d Cir. 1976), the court held that the delay of the National Labor Relations Board of greater than five years in computing the amount of back pay to be awarded employees under an NLRB decision was the type of inaction which violated the mandate of the Administrative Procedures Act providing for prompt disposition of agency proceedings.

Citing the similarity to the Administrative Procedures Act requirement of promptness, 5 U.S.C. §555(b), Court of Appeals for the Sixth Circuit in *Blankenship vs. Secretary of HEW,* 587 F.2d 329 (6th Cir. 1978), stated that the delays faced by applicants for supplemental security income in Old Age, Survivor and Disability insurance were unreasonable and contrary to the statutory mandate for decisions in reasonable time where the applications did not receive favorable hearing decisions until approximately one and a half years after the initial filing for benefits. The court in *Blankenship* was concerned primarily because of the old age of the applicants.

It was held that a five to seven year delay by the Economic Employment Opportunity Commission in making offers of conciliation and instituting actions under Title VII was unreasonable. *EEOC vs. Bell Helicopter Company,* 426 F.Supp. 785 (N.D. Tex. 1976).

In *Templeton vs. Dixie Color Printing Company,* 313 F.Supp. 105 (1970), the U.S. District Court for the Northern District of Alabama addressed the question of agency inaction. Judge Allgood held that when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency effectively renders a decision adverse to the claimant.

(2) APPELLANT IS ENTITLED TO A FAVORABLE DECISION BY THE OFFICE OF APPEALS, MERIT SYSTEMS PROTECTION BOARD, AS A MATTER OF LAW, WHEN APPELLANT'S RIGHTS TO ADJUDICATION OF HIS CLAIM WITHIN A REASONABLE TIME HAS BEEN VIOLATED DUE TO INORDINATE DELAY AND NEGLECT BY THE GOVERNMENT. The inordinate

delay and neglect by the Government is evidenced by the fact that the 1971-RIF Appeal has stretched over a period of ten (10) years and at the time of the filing of this motion, no final decision has been rendered. The 1972-RIF action is now approaching the age of ten (10) years without any final decision having been rendered.

The Summary of Major Actions in Appellant's cases, which was attached to Appellant's said Motion for Decision sets forth an unmistakable pattern of delay and neglect stretching over an inordinate period of ten years. The administrative delay and neglect has proximately damaged Appellant as follows:

(a) Appellant was approximately sixty-three (63) years old at the time of the original appeals, and Appellant is now seventy-three (73) years old.

(b) Appellant has expended over Thirty-three thousand nine hundred thirty dollars ($33,930.00) in fees and expenses in connection with his appeals through October 31, 1981. These fees and expenses are documented in Appellant's Motion for Attorney's Fees and Other Expenses Pursuant to the Equal Access to Justice Act heretofore filed in this cause on November 25, 1981.

(c) Appellant's ability to prosecute his case has been prejudicially diminished due to the long passage of time. For example, many witnesses have died and the recollections of the other witnesses have dimmed with the passage of time.

Appellant has established of record both a substantial and prima facie case in support of both appeals. No Government official involved in this case has ever made a statement or taken a position to the contrary.

Appellant respectfully submits that due to the violation of his rights caused by the said inordinate delay and neglect by the Government, he is entitled to the relief which is due to be given in the event of a default. It cannot be seriously questioned that the Government has defaulted in making its case. The Government has not and cannot reasonably justify the long delays in this case. Since the Appellant has established a prima facie case and the Government has defaulted,

Appellate is entitled as a matter of law to a favorable decision and appropriate relief in these appeals.

Dated this 16 day of February, 1982.

Respectfully submitted,

SMITH, HUCKABY & GRAVES, P.A.

BY: /s/ Robert Sellers Smith

Robert Sellers Smith, Attorney
for Appellant
223 East Side Square
Huntsville, Alabama 35801
(205) 533-5040

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent this date to the following parties:

National Aeronautics and Space Administration
Marshall Space Flight Center
Attention: Personnel Office
Huntsville, Alabama 35812

Mr. Robert Paetz
Route 1, Box 418
Grant, Alabama 35747

Office of the Secretary
Merit Systems Protection Board
1717 H Street, N. W.
Washington, D. C. 20419

NASA Headquarters
Program Management Division
Code OPM
Washington, D. C. 20456

Mr. Lawrence F. Watson
Attention: CC01
Marshall Space Flight Center
Huntsville, Alabama 35812

Office of Policy Analysis
Office of Personnel Management
Attention: Ms. Jeanette Neville
1900 E Street, N. W.
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Washington, D. C. 20415

Office of the Special Counsel
Merit Systems Protection Board
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Room 317
Atlanta, Georgia 30309

Date: February 17, 1982.

/s/ Robert Sellers Smith

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A-79

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA FIELD OFFICE

Robert Paetz

v.

National Aeronautics and Space Administration

Initial Decision Number ATO35119003

Date Jun 01 1981

INTRODUCTION

These appeals are before the Atlanta Field Office as the result of a July 19, 1979 decision by the Office of Appeals Review, Merit Systems Protection Board, which rescinded the April 6, 1978 decisions of the Atlanta Field Office and remanded the appeals for further proceedings consistent with the remand decision.

JURISDICTION

Since the actions at issue arose prior to the enactment of the Civil Service Reform Act (Reform Act) of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the law and regulations in effect at the time of the actions apply to the appeals. See Reform Act § 902(b). Administrative appellate jurisdiction concerning the appeals was established in the prior adjudications and is herein adopted.

BACKGROUND AND PRIOR APPELLATE HISTORY

By a reduction in force (RIF) notice dated August 16, 1971, the appellant was advised that he would be separated from his GS-15 Aerospace Technology (AST) position with the National Aeronautics and Space Administration (NASA), the agency, at the Marshall Space Flight Center (MSFC), Huntsville, Alabama, effective October 2, 1971. The appellant was subsequently offered, and accepted, in lieu of separation, a change to lower grade to an AST, GS-12

position, effective October 3, 1971. By a letter dated October 15, 1971, as supplemented, the appellant appealed the RIF action to the Atlanta Regional Office, United States Civil Service Commission [subsequently, the Atlanta Field Office, Federal Employees Appeals Authority, and now, the Atlanta Field Office, Merit Systems Protection Board (MSPB)].

The appellant was subsequently advised, by a RIF notice dated March 15, 1972, that he would be separated from the GS-12 position effective June 29, 1972. The separation, for reasons not germane here, was not effected until July 12, 1972.

By a decision dated May 3, 1972, the Atlanta Regional Office sustained the 1971 RIF action which changed the appellant to a lower grade; and by a decision dated December 12, 1972, the Atlanta Regional Office sustained the 1972 RIF action which separated the appellant from employment at MSFC. Both regional office decisions were appealed to the Board of Appeals and Review, United States Civil Service Commission (USCSC) (subsequently Appeals Review Board, USCSC; then the Office of Appeals Review, FEAA; and now Office of Appeals, MSPB). By decisions issued on December 7, 1972, and April 23, 1973, respectively, the Board of Appeals and Review affirmed the two regional office decisions.

On January 11, 1974, the appellant, through counsel, petitioned the Commissioners of the Civil Service Commission to reopen and reconsider the December 7, 1972 Board of Appeals Review decision; however, on June 11, 1974, the Commissioners denied the request.

The appellant then filed a civil suit concerning both RIF actions in the United States District Court for the Northern District of Alabama, Northeastern Division. In that action, the appellant raised, for the first time, the issue of age discrimination. By an order issued on February 1, 1977, the court, without specifying the basis for its decision, remanded the matter to the Civil Service Commission for a *de novo* hearing. Thereafter, the Appeals Review Board rescinded the Atlanta Regional Office decisions and remanded the cases to the Atlanta Field Office, FEAA, for an appropriate

hearing and a new adjudication. Hearings were conducted by the Atlanta Field Office on September 28, 29, and 30, 1977, at the Marshall Space Flight Center, Huntsville, Alabama. By separate decisions, each dated April 6, 1978, the Atlanta Field Office found no violation of the appellant's rights under the reduction-in-force regulations in either of the RIF actions. The decisions also set forth the conclusion that the appellant had not supported the claim of age discrimination.

The appellant, through counsel, appealed the Atlanta Field Office decision to the Appeals Review Board, USCSC. The Office of Appeals Review, MSPB, combined the appeal cases and in a decision dated July 19, 1979, rescinded the Atlanta Field Office decisions and remanded the cases to the Atlanta Field Office for the purpose of allowing the development of additional evidence regarding the issue of age discrimination. The decision specifically found that the appellant had been improperly denied the right to obtain statistical and/or documentary information from the agency in connection with the discrimination issue and that the appellant had been improperly denied the right to examine the MSFC Director as a witness at the hearings or by interrogatories which had been previously submitted.

Following the July 19, 1979 remand to the Atlanta Field Office, the appellant, through counsel, was afforded the right to develop evidence concerning the issue of age discrimination through interrogatories or the personal testimony of the MSFC Director. Counsel for the appellant, by letter dated August 14, 1979, elected to proceed with interrogatories. The appellant's request for another hearing, in order to call other witnesses, was denied on the basis that the Office of Appeals Review remand decision concluded that the testimony of the MSFC Director, as a witness or by responses to interrogatories, together with the development of statistical and documentary evidence, would be sufficient to afford the appellant the opportunity to develop relevant evidence concerning the age discrimination issue.

After an extended discovery period, the record was closed upon receipt of the agency's May 2, 1980 response to the

appellant's final submission on the issue of age discrimination.

FINDINGS OF FACT AND CONCLUSIONS

The two April 6, 1978 Atlanta Field Office decisions addressed the appellant's procedural claims; competitive area and competitive level claims; and assignment claims.

Except for the age discrimination issue, the appellant's claims with respect to the RIF actions were set out and fully addressed, in detail, in the two April 6, 1978 Atlanta Field Office decisions. They included a claim that the 1971 RIF notice was procedurally defective; that the retention register used improper position titles; that the competitive area was too narrow; that competitive levels were too narrow; that the appellant was denied assignment rights to certain other positions which he identified; and allegations concerning the agency's contracting-out practices.

I have carefully reviewed the entire appellate record concerning both RIF actions and find that the April 6, 1978 decisions included an appropriate and accurate comprehensive analysis concerning those claims. Accordingly, the April 6, 1978 field office decisions setting forth the findings with respect to those issues are herein adopted as the analysis and findings in this decision.

I turn now to the affirmative defense by the appellant that the RIF actions discriminated against him because of his age (age 62 at the time of the 1971 RIF). In this regard, the appellant claimed that he was selected for downgrading and later separation because of his age and years of service.[1]

The order and allocation of proof in an individual, disparate treatment claim of employment discrimination were set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* standards apply to individual claims of employment discrimination in the Federal sector.

---

[1]The Age Discrimination Employment Act (ADEA) of 1967, Pub. L. No. 90-202, December 15, 1967, was not applicable to federal employees; *however, Pub. L. No. 93-259, April 8, 1974, later amended the ADEA to include federal employees. See 29 U.S.C. § 633(a).*

Whiteside v. Gill, 580 F.2d 906 (5th Cir. 1978); *Abrams v. Johnson,* 534 F.2d 1226 (5th Cir. 1976). Accordingly, I find it appropriate to apply those standards in considering the appellant's claim of age discrimination.

Under *McDonnell Douglas*, the complainant carries the initial burden of establishing a *prima facie* case of discrimination. This burden requires a showing of actions taken by the employer from which one can infer, if such actions remained unexplained, that they were taken for discriminatory reasons. *Furnco Construction Corp. v. Waters,* 98 Supreme Court 2943 (1978).

To establish a prima facie case, the appellant must show that he belongs to a protected group, that he was employed by the agency in a specified position, and that he was treated differently by the agency in some aspect of that employment from persons outside his group occupying the same or similar positions.

Following such a prima facie showing, the burden shifts to the agency, which is required to establish a valid, nondiscriminatory reason for the challenged action. If the agency is able to rebut the prima facie showing, the burden shifts back to the appellant to show that the employer's stated reason(s) for the challenged action is actually a pretext or cover-up for a discriminatory decision. *McDonnell Douglas Corp. v. Green,* 411 U.S. at 805, n. 19. Notwithstanding the foregoing, the appellant must nevertheless support his affirmative defense by a preponderance of the evidence. Moreover, the appellant must show a crucial connection between the discrimination complained about and the action appealed.

At the time of the reduction-in-force actions, the appellant was employed by the agency in a specified position and at age 62, belonged to what is now considered a protected group.

The appellant furnished extensive statistical data and hypotheses derived from evidence developed concerning the 1971 RIF, purportedly showing that a disproportionate number of employees over age 50, as was the appellant, were affected by the RIF. While the evidence furnished by the appellant could be construed to support such an assertion,

my analysis, as set out below, leads me to conclude that there was little statistical disparity.

The uncontroverted evidence shows that at the time of the 1971 RIF there were 5,760 employees; that the ages of employees affected ranged from under 25 to over 66; and that of those employees whose change to lower grade were proposed, 43 (0.9%) of those under age 50 were affected; and 27 (1.9%) of those over age 50 were affected. I find the one percentile difference in the number of employees affected by a change to lower grade to be statistically insignificant.

The evidence concerning the 105 employees who were separated in the 1971 RIF shows that 34 (approximately 0.8%) of the under age 50 group was affected and that 71 (approximately 5%) of the over age 50 group was affected. I find that the approximately 4.2% differential in the two groups to be statistically insignificant.

That the statistical evidence presented by the appellant shows a higher incidence of retirement by employees over age 50 than among those under age 50 is unsurprising in light of the fact that employees under age 50 may become eligible for optional retirement (other than disability) only under the unique circumstances which allow for discontinued service retirement (providing the employee has at least 20 years' creditable service).

The appellant furnished no evidence of age discrimination with respect to the 1972 RIF, and my review of the record discloses nothing that would support such a claim.

The evidence reflects that agency officials were legitimately concerned about MSFC staffing, which had been affected as a result of a series of RIF actions that commenced in the mid 1960's, together with hiring freezes, and that alternatives were suggested and explored; however, the RIF actions which affected the appellant complied with the rules and regulations concerning RIF and are not shown to have been motivated or conducted discriminatorily.

The evidence presented does not show that the appellant was treated differently by the agency from similarly situated employees outside his group. To the contrary, the evidence

shows that a significant number of employees outside the protected group (under age 40) were also affected in the two RIF's at issue. For this reason, I find that the appellant has not established a prima facie case of age discrimination. But, assuming arguendo, that the appellant had met that burden, the agency's reason for conducting the reduction-in-force actions, the reduction in personnel due to budget reductions, constituted a legitimate, non-discriminatory reason for the reduction-in-force actions. The appellant has not shown that the reason for the reduction in force was a pretext or a cover-up for a discriminatory decision.

In summary, I find no violation of the appellant's rights under the reduction-in-force regulations and find that the evidence does not support the claim of age discrimination.

DECISION

The reduction-in-force actions are affirmed.

NOTICE

Unless this decision is further appealed within 15 calendar days of the date on which it is received, it becomes the final decision of the Merit Systems Protection Board. Any further appeal of this decision must be sent directly to the Office of the Secretary, Merit Systems Protection Board, 1717 H Street, N.W., Washington, D. C. 20419.

For the Board:

/s/ S. F. Vesser

S. F. VESSER
Presiding Official

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent this date by certified mail return receipt requested, to the following parties:

National Aeronautics and Space Administration
Marshall Space Flight Center
Attention: Personnel Office
Huntsville, Alabama 35812

Mr. Robert Paetz
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Mr. Lawrence F. Watson
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Mr. Robert S. Smith
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Copies of the foregoing were sent this date by regular mail to the following parties:

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1717 H Street, N.W.
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Program Management Division
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Office of Policy Analysis
Office of Personnel Management
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Atlanta, Georgia 30309

/s/ Jan Marie Johnson
Clerk-Typist

Date JUN 01 1981
Atlanta, Georgia

MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

19 JUL 1979

RIF - 1971/1972

Mr. Robert Sellers Smith
SMITH, HUCKABY & GRAVES
Attorneys at Law
Suite A
223 East Side Square
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Dear Mr. Smith:

Enclosed is the Board's decision in the case of Robert Paetz.

Sincerely yours,

/s/ Cameron C. Smith

Cameron C. Smith, Acting
Director
Office of Appeals Review

cc: Mr. Robert Paetz
Route 1, Box 418
Grant, Alabama 35747

Mr. Lawrence F. Watson
Agency Representative
National Aeronautics and Space
Administration
George C. Marshall Space Flight Center
Marshall Space Flight Center, Alabama 35812

Director
Attention: Personnel Officer
National Aeronautics and Space Administration
George C. Marshall Space Flight Center
Marshall Space Flight Center, Alabama 35812

MERIT SYSTEMS PROTECTION BOARD
OFFICE OF APPEALS REVIEW
WASHINGTON, D.C. 20419

DECISION

IN THE MATTER OF

	)
	) TYPE CASE:
	) Reduction in Force:
	) Change to Lower Grade,
Robert Paetz	) and subsequent Separation
	)

Before: Member Palmquist—Rescind/Remand
Member Tillman —Rescind/Remand
Member Stanislav —Affirm
By Majority Vote —Rescind/Remand

INTRODUCTION

The appellant, Mr. Robert Paetz, through counsel, appealed from the decisions of the Atlanta Field Office, Federal Employee Appeals Authority, finding that his rights under reduction-in-force regulations were not abridged when he was changed to lower grade effective October 3, 1971, and subsequently terminated effective July 12, 1972, by the National Aeronautics and Space Administration.

STATEMENT OF THE CASE

By reduction-in-force notice dated August 16, 1971, the appellant was informed that he would be separated, effective October 2, 1971, from the position of Aerospace Technology (AST), Launch Vehicle Project Management, GS861-15, National Aeronautics and Space Administration (NASA), Marshall Space Flight center (MSFC), Huntsville, Alabama. The appellant was subseqently offered, in lieu of separation, a change to lower grade to the position of AST, Technical Management, GS-1301.1-12, effective October 3, 1971. The

appellant accepted the change to lower grade, and by letter dated October 15, 1971, as supplemented, he submitted an appeal to the Atlanta Regional Office, U.S. Civil Service Commission (subsequently, the Atlanta Field Office, Federal Employee Appeals Authority, and now the Atlanta Field Office, Merit Systems Protection Board).

By reduction-in-force notice dated March 15, 1972, the appellant was informed that he would be separated, effective June 29, 1972, from his position of Aerospace Technology, Technical Management, GS-1301.1-12. He appealed this action to the Atlanta Regional Office, USCSC, by letter of June 20, 1972. His separation was effected on July 12, 1972.

The Atlanta Regional Office, by decision issued on May 3, 1972, sustained the action of the agency in effecting the change of the appellant to lower grade, and by its decision issued on December 12, 1972, the Regional Office affirmed the agency action in separating the appellant by reduction in force. Both Regional Office decisions were appealed to the Board of Appeals and Review, U.S. Civil Service Commission (now the Office of Appeals Review, Merit Systems Protection Board), and by its decisions issued on December 7, 1972 and April 23, 1973, respectively, the Board affirmed the two Regional Office decisions. On January 11, 1974, the appellant, through counsel, petitioned the Civil Service Commissioners to reopen and reconsider the Board's December 7, 1972 decision, and on June 11, 1974, the Commissioners denied the request to reopen the appellant's case.

Pursuant to an order issued on February 1, 1977, by the U.S. District Court for the Northern District of Alabama, Northeast Division, the Appeals Review Board rescinded the decision of the Atlanta Regional Office and Remanded the case to the Atlanta Field Office, Federal Employee Appeals Authority, for an appropriate hearing and a new adjudication. The respective hearings were conducted on September 28, and 29 and September 30, 1977, at Marshall Space Flight Center, Huntsville, Alabama.

FIRST APPELLATE LEVEL DECISIONS

The Field Office found, from its review of the entire records in the appellant's cases, that there was no violation of his rights under reduction-in-force regulations either in his change to lower grade effective October 3, 1971, or in his separation effective July 12, 1972, and that there was no basis in the record for concluding that his separation resulted from discrimination against him because of his age. The Field Office decisions affirming the agency actions were issued on April 6, 1978.

REPRESENTATIONS ON APPEAL

In his appeals from the two Field Office decisions, through counsel, the appellant contended that both the agency's 1971 and 1972 reduction-in-force actions were arbitrary, capricious, and procedurally defective; that the Appeals Officer had erred in finding that the appellant did not have the experience required to perform the duties of another position, number 11408, without significant training and without "undue interruption" of the agency's work program (1971 RIF); that the Appeals Officer was biased in favor of the agency; that the Appeals Officer improperly restricted the witnesses and the evidence at the *de novo* hearing; and that the agency reductions-in force, as conducted, amounted to an unlawful selection procedure which was effected against the appellant because of his age and years of service. He requested a personal appearance in connection with his appeal to the Board.

A copy of the appellant's appeals was forwarded to the agency for whatever comment or rebuttal it might care to offer, and a copy of the agency rebuttal was forwarded to the appellant, through his counsel, for his information.

ANALYSIS AND FINDINGS

Although the Field Office conducted separate hearings in the appellant's reduction-in-force cases and issued separate decisions, *the Board has combined the cases for purposes of issuing its decision.*

The regulations governing review of an appeal in a reduction-in-force case, Section 351.901, Title 5, Code of Federal Regulations, does not provide for a hearing before the appellate body. While a personal appearance may be granted in the discretion of the adjudicative personnel, when such an appearance is considered necessary or desirable for the proper development of the evidence in the case, such an appearance before the Board is not considered to be required in this case.

The appellant's contention that the hearings were improperly restricted is based upon the refusal of the Appeals Officer to call as witnesses, or, in the alternative, require responses to interrogatories propounded to the Director, George C. Marshall Space Flight Center, and the Chairman, U.S. Civil Service Commission. The Appeals Officer ruled that since the record did not show that either of the above-requested witnesses had direct knowledge of essential matters at issue in the appellant's case, and since witnesses were being called who did participate directly in the reduction in force, they would not be called to testify.

The Chairman, USCSC, was requested to testify and provide documents regarding Civil Service regulations, provisions of those regulations relating to the requirements placed on agencies for documentation of personnel actions, whether appellant's agency had been granted an exemption from portions of those requirements, etc. The Appeals Officer ruled, and the Board agrees, that the CSC Chairman would have had no direct knowledge of matters essentially relating to the reduction-in-force actions here at issue.

The testimony of the Director, MSFC, was desired to provide information relating to personnel practices engaged in by the Center and governing personnel policies, as well as information and statistics relative to the issue of age discrimination. The Appeals Officer ruled that the Director would not have first-hand information relative to the conduct of the reductions in force, and since other witnesses were being provided who did have such information, his presence would add nothing to the hearings.

On May 9, 1975, appellant's counsel submitted to the Director, MSFC, an interrogatory in connection with the civil action that had been filed in U.S. District Court for the Northern District of Alabama, Northeast Division. In item 8 of that interrogatory, he requested information regarding the agency's compliance with "Age Discrimination Laws" and statistical impact assessments relative to age in the conduct of the reduction-in-force actions. Counsel subsequently requested that the Court prepare an order requiring an answer to the interrogatory, to which the agency had not responded. The Court evidently did not rule upon the Government's motion for dismissal of the age discrimination issue, nor upon the counter-motion of appellant's counsel, but then remanded the case for *de novo* hearing.

The Court did not specify the basis for the remand, other than for hearing, nor did the Court specify whether or on what basis the issue of discrimination because of age and length of service was to be considered in the further processing of the appellant's case. While it does not appear that the discrimination issue was remanded for consideration under the Age Discrimination in Employment Act and development pursuant to the procedures set forth in Section 713.216, Title 5, Code of Federal Regulations, it does appear that the issue was remanded for consideration in connection with the question of whether the agency's actions in implementing the reductions in force were arbitrary and capricious.

Following the remand of the cases to the Atlanta Field Office, Federal Employee Appeals Authority, a pre-hearing conference was convened on May 13, 1977. At that time, the parties agreed that one of the issues to be considered would be the appellant's allegation that the reduction-in-force actions resulted from discrimination against him on the basis of *his age and length of service.* The Appeals Officer noted that it was the appellant's responsibility to establish by a preponderance of the evidence his claim regarding age discrimination. *In his "Additions and Corrections to Summary of Prehearing Conference," appellant's counsel again requested, as he had prior to the pre-hearing conference, the appearance at the hearings of the*

Director, MSFC, or, alternatively, answers to his interrogatories previously submitted. The Appeals Officer declined to call the Director as a witness.

The Appeals Officer noted, in his April 6, 1978 decisions in appellant's cases, that the appellant had been afforded ample opportunity to show that his rights under applicable Civil Service rules and regulations had been violated in the reduction-in-force action at issue, and that there was no evidence to support the appellant's allegation that the actions effected against him resulted from discrimination against him because of his age or years of service.

Upon review, however, we find that the allegation of age discrimination was accepted by the Appeals Officer and, although the burden of proof was placed on the appellant to establish his claim by a preponderance of the evidence, *that the appellant was not given the opportunity to develop information that might have supported the allegation. The agency had refused to provide statistics and information, in the form of a response to the appellant's interrogatory submitted to the Director, MSFC, relating to the issue of discrimination, but noted it would make additional pertinent information available as called for by the Appeals Officer. The Appeals Officer then refused to permit the calling of the Director as a witness, and in advance of the hearing, he failed to allow the request for any statistical or specific documentary information from the agency that would have enabled the appellant to pursue his allegation of discrimination at the hearing.*

It appears that the Court contemplated that the appellant would be afforded a reasonable opportunity to develop the issue of discrimination, the agency was the only source of pertinent information, the agency had refused to supply the information, and the Appeals Officer failed to request it or to take other steps to make it available to the appellant. The Field Office had the authority to require the presence of the Director as a witness for that limited purpose, or, in the alternative, require that he respond to the interrogatories, as appropriate. However, it did neither. Thus, the appellant was placed in an untenable position relative to supporting his burden of proof regarding this issue.

DECISION

Under the circumstances, the Board hereby rescinds the April 6, 1978 decisions of the Atlanta Field Office and remands the appellant's cases to that office for further proceedings consistent with this decision, because of the Field Office's prior failure to consider the appellant's request for the Director, MSFC, as a witness in light of the interrogatories relative to the age discrimination issue, and the denial of opportunity for the appellant to obtain response to those interrogatories or pertinent testimony in lieu thereof.

For the Board:

/s/ Cameron C. Smith

Cameron C. Smith, Acting
Director
Office of Appeals Review

19 JUL 1979

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
April 6, 1978

Mr. Robert Sellers Smith
Attorney at Law
Central Bank Building
Huntsville, Alabama 35801

Dear Mr. Smith:

We have examined your appeal in behalf of Mr. Robert Paetz under Part 351 of Title 5, Code of Federal Regulations.

Based on the total evidence in the file, it was determined that the action by the agency should be affirmed. In this respect, we have enclosed a copy of our analytic memorandum.

Sincerely yours,

/s/ Ira R. Harrison

IRA. R. HARRISON
Appeals Officer

Enclosure

cc:
Director
Attention: Personnel Officer
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
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UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
ATLANTA FIELD OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. ROBERT PAETZ
UNDER PART 351, TITLE 5, CODE
OF FEDERAL REGULATIONS
DECISION NUMBER AT035180124
DECIDED ON APRIL 6, 1978

I. INTRODUCTION

By reduction-in-force noticed dated August 16, 1971, the above-referenced appellant was informed that he would be separated, effective October 2, 1971, from the position of Aerospace Technology (AST), Launch Vehicle Project Management, GS-861-15, National Aeronautics and Space Administration (NASA), Marshall Space Flight Center (MSFC), Huntsville, Alabama. By an amendment to the notice, dated September 1, 1971, the appellant was offered, in lieu of separation, a change to lower grade to the position of AST, Technical Management, GS-1301.1-12, effective October 3, 1971. The appellant accepted the change to lower grade, and the action was effected on the date stated in the notice. By letter dated October 15, 1971, as supplemented, the appellant submitted an appeal to the Atlanta Regional Office, U.S. Civil Service Commission, Atlanta, Georgia (now the Altanta Field Office, Federal Employee Appeals Authority).

This appeals comes within the purview of Part 351, Title 5, Code of Federal Regulations (5 CFR 351.201, et seq.) and was timely filed. Accordingly, we have accepted it for adjudication.

II. PRIOR APPELLATE HISTORY

The Atlanta Regional Office, on May 3, 1972, issued a decision sustaining the action of the agency effecting the change to lower grade by reduction in force. By letter dated May 9, 1972, as supplemented, the appellant's representative

submitted in his behalf an appeal to the U.S. Civil Service Commission, Board of Appeals and Review (now the Appeals Review Board) from the decision of the Atlanta Regional Office.

The Board issued a decision on December 7, 1972, affirming the decision of the Commission's Atlanta Regional Office. In its decision, the Board noted that the appellant had exhausted his administrative remedies, and that there was no further right of administrative appeal.

On January 11, 1974, the appellant, through counsel, petitioned the Civil Service Commissioners to reopen and reconsider the Board decision. In that submission, and in subsequent submissions, the appellant questioned the propriety of the change-to-lower-grade action by reduction in force and reasserted the contentions made during the course of his appeal. On June 11, 1974, the appellant was notified through his representative that the Commissioners found no valid basis for disagreeing with the analysis and findings and decision of the Board. The Commissioners therefore denied the request to reopen the appellant's case.

Pursuant to an order issued on February 1, 1977, by the U.S. District Court for the Northern District of Alabama, Northeastern Division, the Commission's Appeals Review Board rescinded the May 3, 1972, decision of the Commission's Atlanta Regional Office and remanded the case to the Atlanta Field Office, Federal Employee Appeals Authority, for an appropriate hearing and a new adjudication.

The hearing mandated by the Court's order was conducted on September 28 and 29, 1977, at Marshall Space Flight Center, Huntsville, Alabama. Both parties were represented at the hearing, and a verbatim transcript of the proceedings is a part of the permanent record in this case.

III. ANALYSIS AND FINDINGS

In effecting a reduction-in-force action, an agency must comply with the regulatory requirements of Part 351 of the Civil Service Regulations. The Civil Service Commission, pursuant to its appellate authority, reviews appeals from reduction-in-force actions to determine whether the appel-

lant was properly within reach for release from the competitive level to which officially assigned at the time of the reduction-in-force action, whether the notice of reduction-in-force action was timely and otherwise in accord with the notice requirements in the regulations, and, if the appellant was so entitled, whether a reasonable offer of assignment was made. The appellant's claims and the facts in his case have been evaluated in light of these requirements.

Before addressing the appellant's claims, we must decide the weight to be given the testimony of Mr. George R. Boss, a witness at the hearing. The appellant called Mr. Boss to testify as an expert in reduction-in-force procedures. The record shows that the witness is a former Federal employee who retired with 35 years' service, of which 25 years were concerned with position classification, classification standards, and other personnel matters not related to reduction in force. Mr. Boss' only experience directly related to reduction in force is eight years he spent as Director of the Labor-Management Department of the American Federation of Government Employees. In that capacity, he served as the representative for appellants in various types of appeals, including reduction-in-force appeals, and, in fact, he represented the appellant in this case in his original appeal to the Commission's Board of Appeals and Review. After a careful review of Mr. Boss' experience and qualifications, we conclude that Mr. Boss does not qualify as an expert in reduction-in-force regulations and procedures. We will, however, consider the allegations of procedural impropriety in the reduction in force that were asserted by Mr. Boss the same as if they had been made by the appellant.

First, the appellant contends that the reduction-in-force notice is fatally defective because it intermingles Commission classification standards and terminology with that of NASA standards, and because it fails to identify the appellant's position number.

Section 351.802 of the Civil Service Regulations, which describes the content of a reduction-in-force notice, does not require an agency to identify the position to which an employee is officially assigned at the time of the action to be

taken. Thus, the failure of the notice to identify the appellant's position by its number, or to use a title not specifically provided for in the Commission's classification standards is not a violation of the reduction-in-force regulations. Furthermore, if the appellant were in doubt as to whether his position had been properly identified in the notice, he could have raised that issue and had the notice corrected at any time prior to the effective date of the reduction in force. In view of these facts, and after examination of the reduction-in-force notice to the appellant, as amended, we find no violation of the appellant's rights under the notice requirements of the reduction-in-force regulations.

Next, the appellant argues that his competitive area was too narrow, that the agency established it arbitrarily. His argument in support of this claim, however, appears to relate to the establishment of competitive levels, which we will discuss in further detail below. In any case, the description of the competitive area shows that it consisted of all NASA employees located at the Marshall Space Flight Center, Huntsville, Alabama. The standard for a competitive area, as defined in Section 351.402(b) of the Civil Service Regulations, is that it should include all or that part of an agency to which employees are assigned under a single administrative authority. A competitive area in the field service meets this standard when it covers a field installation and its commuting area. Accordingly, we find that the competitive area for this reduction in force meets the standard established by the regulations.

Another contention is that the retention register is improper because it lists positions by agency titles, rather than by the titles specified in the Commission's classification standards. However, our examination and review of the entire retention register reveals that, although it lists positions by agency position titles, it contains all required information for identification of positions, including the position number, series and grade, organization location and competitive level number. Therefore, we find no violation of the reduction-in-force regulations in this respect.

The appellant initially raised general claims that the agency had unduly restricted the competitive levels. In support of these claims, he pointed out that there were 303 competitive levels for 340 employees at the GS-15 level, of which 281 positions were in single-position competitive levels. In response to our request that he identify specific positions which he believed should have been included in his competitive level, he identified the positions in the following competitive levels: 15-067; 15-301; 15-324; 15-372; 15-406; 15-453; 15-536; 15-137; and 15-417.

The issue relating to the establishment of the appellant's competitive level has been examined in light of Section 351.403 of the Civil Service Regulations, which sets forth the authority and responsibility of an agency to establish competitive levels. Under this provision, competitive levels must consist of all positions which are so similar in all important respects that the agency can move an employee from one position to another without significant training, or without unduly interrupting the work program. Although some positions possess such similarities that they outwardly appear to be interchangeable, these positions must be assigned to separate competitive levels if they vary by one or more important factor. A determination whether positions are mutually interchangeable within the meaning of the reduction-in-force regulations is made on the basis of the information contained in the official position descriptions, rather than on the comparative qualifications of the incumbents of the positions in question. Any significant differences of the duties, responsibilities, or qualification requirements, as set forth in the official position descriptions, is sufficient to warrant separate competitive levels for the respective positions.

In order to resolve the issues of the appellant's competitive level, we submitted the entire appeal file, including a copy of the hearing transcript, to staffing specialists of the Commission's Atlanta Regional Office, who, through training and experience, are competent to determine competitive-level issues. We requested that they furnish an advisory opinion addressing the competitive-level issues raised by the appel-

lant. In an advisory opinion dated December 30, 1977 (copy attached), the staffing specialists advised that the appellant's position of AST, Launch Vehicle Project Management (Supervisory Aerospace Engineer), GS-861-15, was properly placed in a competitive level apart from any of the positions he had specifically identified in his appeal as belonging in his competitive level.

Copies of the advisory opinion were furnished to both parties for their review and comment. The appellant's representative responded by letter dated February 6, 1978, claiming that the Regional Office relied on factors in addition to duties, responsibilities, and qualification requirements of the positions. He also asserted, in effect, that all positions with the same title, series, and grade should be in the same competitive level. We have already fully set out the regulatory criteria for establishing competitive levels. Although it is true that nine of the positions at issue are in the Aerospace Engineer series, GS-861, in the Flight Systems specialty, each of these positions clearly has different duties and responsibilities, as more particularly set forth in the advisory opinion. For example, the basic function of the appellant's position is management of the specific S-1C Stage Project. On the other hand, position number 13591-S, also a Supervisory Aerospace Engineer position, is responsible for planning, coordinating, implementing, and managing the production programs of the Saturn Engine, and includes the operational and flight support functions. The duties and responsibilities, and therefore the qualification requirements, are clearly different between these two positions.

Based upon our review of the entire record, we adopt the advisory opinion of December 30, 1977, as being dispositive of the competitive-level issue raised in this case. Accordingly, we find that the appellant's position was properly placed in a competitive level separate from the GS-15 positions in the competitive levels specifically identified by the appellant in connection with this contention. Furthermore, our review of the retention register for the appellant's competitive level, 15-54, established that he had the lowest retention standing of any of the five employees who held positions in that

competitive level. Thus, he was within reach for release from the competitive level for reduction-in-force action.

Although the appellant states that he does not contest the need to abolish his position, he contends that the agency denied him assignment rights to another position at the GS-15 level. In support of his contention, he alleges that the agency's failure to provide him with an official position description of the duties and responsibilities he performed during the period from June 1960, to March 16, 1966, not only denied him proper consideration of his qualifications for assignment during the reduction in force, but also constituted reversible procedural error. He alleges that his Official Personnel Folder (OPF) not only inaccurately depicts his official position assignments during this period of time, but also does not include official position descriptions setting forth the duties and responsibilities of his actual position assignments. The appellant also requests that we direct the agency to correct the alleged inaccuracies in the OPF.

First, the correction of alleged errors in the OPF is not within our appellate authority in a reduction-in-force appeal. Second, the mere fact that the agency erroneously recorded, or failed to record, the appellant's official position assignments during the period from 1960 until March 16, 1966, would not, in itself, warrant a conclusion that the reduction-in-force action taken in this case is invalid. Third, it is immaterial whether the OPF included position descriptions for the positions to which he was officially assigned. The regulations require an agency neither to maintain position descriptions in an employee's OPF, nor to maintain in its files the descriptions of inactive positions. In any case, the record shows that the appellant was afforded an opportunity to submit, and did submit, information regarding the duties and responsibilities that he actually performed during the period from 1960 to 1963, at which time he received an official position description. Furthermore, the evidence shows that the agency evaluated the appellant's qualifications for assignment on the basis of information he himself submitted. Specifically, the agency relied upon the information he furnished in evaluating his qualifications for assign-

ment to position number 11408, held by Mr. Max E. Nowak (Transcript, Vol. II, pp. 151-153). Finally, we have considered the information the appellant submitted, as well as the testimony of witnesses with respect to his official position assignments during the periods in question, in making a determination regarding the appellant's assignment rights in the reduction in force.

In addition to his general claims with respect to assignment rights, as discussed above, the appellant contends that he was entitled to assignment to one of the positions held by Mr. Max E. Nowak and Mr. Harry M. Flake. In addition, the appellant claims that he was improperly denied assignment rights to positions in the excepted service held by aliens. In regard to the latter claim, Section 351.705(b)(4) of the Civil Service Regulations prohibits an agency from assigning an employee holding a competitive position to a position in the excepted service. Since the appellant held a position in the competitive service at the time of the reduction-in-force action, his assignment rights extended only to positions in the competitive service.

In our review of the appellant's claim of assignment rights, we rely upon Subpart G of Part 351 of the Civil Service Regulations, government assignment rights in a reduction in force. It provides, in pertinent part, that an employee in retention group I or II who is reached for release from his competitive level is entitled to assignment to a position for which he is qualified, when such position is held by an employee in a lower retention subgroup. The retention register shows that Mr. Flake is not in a lower retention subgroup than the appellant, a retention category I-B employee. Mr. Nowak, a retention category II-B employee, is in a lower retention subgroup than the appellant; therefore, the question to be determined is whether the appellant is qualified to assignment to the position held by Mr. Nowak, i.e., AST, Experimental Manufacturing Techniques, GS-861-15, job number 11408.

Paragraph 7-6(a), Chapter 351 of the Federal Personnel Manual, which treats the matter of qualifications for assignment in reduction in force, provides that, in order for an

employee to be entitled to assignment to a position in another competitive level, he must meet the Commission's standards and requirements, including any minimum educational requirements. In addition, he must be qualified physically to perform the position's duties, and he must meet any special qualifying conditions the Commission sets forth for the position. He must also have the capacity, adaptability, and any specialized skills required for satisfactory performance of the duties and responsibilities of the position without undue interruption of the agency's work program. As pointed out in paragraph 7-6(vb:

> To be considered qualified, and thus entitled to be placed, the employee should not need a significant amount of training in the actual duties of the position, although some instruction may be necessary to familiarize him with the organizational structure and with the office policies and routines he will have to apply. In other words, he ought to be as well-qualified for the position as if he had already performed successfully in a similar position, because he must be able to keep the work moving without serious interruption.

We referred the issue of the appellant's qualifications for position number 11408 to the Staffing Division of the Commission's Atlanta Regional Office, whose staffing specialists have the experience and training to be competent to make such determinations, and we requested an advisory opinion. In an advisory opinion dated December 30, 1977 (previously referred to), the Staffing Division reported its conclusion that, although the appellant meets the basic qualification requirements for the position, he could not be expected to perform its duties without significant training and without undue interruption to the work program because of the nature of the program itself. Their opinion is based upon consideration of the entire appeal file, including: the representations submitted by the appellant and the agency; the appellant's work history, as described by the appellant and the agency; the position description of position number 11408; and pertinent qualification standards. A

copy of the advisory opinion was submitted to the appellant and the agency for review and comment.

Both the appellant and his representative submitted responses contending that the agency based its denial of the appellant's assignment rights on his failure to meet the basic qualification requirements for the position, rather than an undue interruption, which is cited in the advisory opinion. The appellant relied on Mr. Robert Lindstrom's testimony at the hearing to support this contention. The appellant asserts also that there is no testimony in the record to show that the appellant's experience which basically qualified him for position 11408 was stale.

The appellant's claims concerning the agency's basis for its determination not to offer him assignment to the position are immaterial. The Staffing Division made an independent evaluation of the appellant's qualifications for assignment to position number 11408 based upon a review of the entire record in the case. As for the currency of the appellant's experience, the advisory opinion points out that the appellant's most recent qualifying experience was gained approximately eight years prior to the reduction-in-force action, and, as Mr. Lindstrom noted, there were in the interim advances in the area of welding and structural fabrication utilizing welding. In any event, it is well known that many technological changes occurred in the aerospace industry during the period from 1963 to 1971.

The appellant also argues that he performed the duties of position number 11408 from September 25, 1963, to December 28, 1963. This claim is apparently based upon his assignment while serving as Technical Assistant to the Director, at which time Mr. Nowak held a position with the same title. The mere fact that positions have identical titles, however, is insufficient to support a conclusion that their duties are similar, much less identical. Furthermore, there is no evidence in the record to support a conclusion that the appellant ever held position 11408, or performed its duties.

A considerable amount of testimony at the hearing was addressed to the question whether the appellant's experience gained during the period from 1960 to 1963, when consid-

ered with his other work experience, was sufficient that he was entitled to assignment to position number 11408. After a careful consideration of the record, including the advisory opinion, we find that the appellant did not have the current, in-depth experience required to perform the duties of that position without significant training, and without undue interruption to the agency's work program. Accordingly, we adopt the Staffing Division's advisory opinion as being dispositive of the qualification issues presented in this case. We therefore find that the appellant was not entitled to assignment to position 11408. The appellant has not identified any other position above the GS-12 level to which he claims assignment rights. Accordingly, we find that the agency's offer of a position at the GS-12 level satisfied the appellant's right of assignment in the reduction in force.

In his original appeal, the appellant asserted that the reduction-in-force action was improper in his case because of the contracting-out practices of the agency. At the prehearing conference on May 13, 1977, the agency and the appellant agreed that the contracting-out issue would not be an issue in the instant case and that each would be bound by the final decision of the courts in the case of the *American Federation of Government Employees, AFL-CIO v. Fletcher,* pending in the U.S. District Court, District of Columbia. Accordingly, no further consideration has been given to this contention.

Finally, the appellant contends that the reduction-in-force action effected against him was based wholly or partly upon discrimination because of his age and years of service. The appellant was afforded amply opportunity to present evidence in support of his contention, including leaving the record open after the hearing to allow for the submission of additional evidence. However, he presented none. In the absence of anything, other than the appellant's bare allegations, to support this claim, we find no basis for concluding that the reduction-in-force action effected against the appellant was based on discrimination because of his age and years of service.

IV. CONCLUSION

After thorough examination of the record, in light of the appellant's claims and the facts in his case, we conclude that the appellant was properly within reach of release from his competitive level; that the reduction-in-force notice to him was timely and otherwise in accord with the reduction-in-force regulations; and that the appellant received a reasonable offer of assignment consistent with his assignment rights in the reduction in force. We further find that the action did not result from discrimination because of the appellant's age or years of service. Our review discloses no violation of the appellant's rights under applicable law and regulations.

V. DECISION

The reduction-in-force action is affirmed.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the Federal Employee Appeals Authority. Any further appeal of this decision must be sent directly to:

Appeals Review Board
U.S. Civil Service Commission
Washington, D. C. 20415

Two copies of this letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15-calendar-day time limitation.

For the Commission:

/s/ Ira R. Harrison

IRA R. HARRISON
Appeals Officer

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
WASHINGTON, D.C. 20415

Mr. Robert Sellers Smith
Attorney at Law
Central Bank Building
Huntsville, Alabama 35801

BEFORE: Zwirn, Roel and McDonald,
Board Members.

Dear Mr. Smith:

Reference is made to the order issued on February 1, 1977, by the United States District Court for the Northern District of Alabama, Northeastern Division, remanding the case of Mr. Robert Paetz to the Civil Service Commission. As a result of that order, the December 12, 1972 decision of the Commission's Atlanta Regional Office (now the Atlanta Field Office, Federal Employee Appeals Authority) is hereby rescinded and the case remanded to that office for the conduct of an appropriate hearing, in compliance with that order, on Mr. Paetz's reduction-in-force from the National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama, effective July 12, 1972. The Atlanta Field Office will further communicate with you and Mr. Paetz concerning this matter.

For the Board:

Sincerely yours,

/s/ Herman D. Staiman

Herman D. Staiman
Chairman

cc: Mr. Robert Paetz
P. O. Box 1594
Huntsville, Alabama 35807

cc: Director
ATTN: Chief Personnel Officer
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
Huntsville, Alabama 358912

cc: Director of Personnel
Code BP
National Aeronautics and Space
Administration
Washington, D.C. 20546

cc: Lyman C. Duncan
Chief Appeals Officer
Atlanta Field Office, FEAA
1340 Spring Street, N.W.
Atlanta, Georgia 30309

UNITED DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	75-G-0167-NE
	)	
WILLIAM R. LUCAS, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause came on to be heard upon the defendants' motion for summary judgment. Having considered the motion, pleadings, and oral arguments of counsel, the court is of the opinion that the moving parties are not entitled to a judgment as a matter of law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be, and the same hereby is, DENIED.

It is furhter ORDERED that this case is REMANDED to the Civil Service Commission for a *de novo* hearing, and the United States Government is ORDERED to present Mr. Robert Lindstrom and Mr. Howell R. Riggs for examination.

DONE this 1st day of February, 1977.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ROBERT PAETZ,	)	
	)	
Plaintiff	)	
	)	
Vs.	)	
	)	CIVIL ACTION
WILLIAM R. LUCAS,	)	NO.
Director, George C. Marshall	)	
Space Flight Center, National	)	CA 75 G 0167 NE
Aeronautics and Space	)	
Administration;	)	
ROBERT E. HAMPTON,	)	
Chairman, United States Civil	)	
Service Commission;	)	
THE UNITED STATES	)	
OF AMERICA	)	
	)	
Defendants	)	
	)	

COMPLAINT

I

Comes now the Plaintiff and for a cause of action against the Defendants, complains and alleges as follows:

This Court has jurisdiction of this action under the provisions of 5 U.S.C. § 701-706.

II

That the Plaintiff above named was and is now a resident of the State of Alabama and his address is Route 1, Box 418, Grant, Alabama 35747.

III

That the Defendant, William R. Lucas, is the Director of the George C. Marshall Space Flight Center, National Aeronautics and Space Administration, Marshall Space Flight Center, Alabama 35812; and that the Defendant, Robert E. Hampton is the Chairman of the United States Civil Service Commission, 1900 E Street, Washington, D. C. 20415.

IV

That the Plaintiff, Robert Paetz, is one of the original 118 member Rocket Team brought to the United States from Germany by Dr. Wernher Von Braun in 1945, under a "Special Contract for Employment of German Nationals with the War Department in the United States" (Paperclip Contract). In this capacity and thereafter as a Civil Service employee, Plaintiff rendered some twenty-seven years of uninterrupted service for Defendant, United States of America, in increasingly responsible positions of the United States Defense and Space Programs. (Redstone, Mercury, Jupiter, Saturn I, Saturn IB and Saturn V Programs.)

Plaintiff was informed by reduction-in-force notice dated August 16, 1971, and amended on September 1, 1971, that he had been selected for reduction-in-force action. In lieu of separation, Plaintiff was downgraded from the position of AST, Launch Vehicle Project Management, GS-15, which grade he had held for fifteen years, to the position of AST, Technical Management, GS-12, effective October 3, 1971.

V

Plaintiff's Civil Service position of AST Technical Management, GS-12, was terminated and he was separated from the Civil Service effective July 12, 1972.

VI

Plaintiff was downgraded from GS-15 to GS-12 effective October 3, 1971, and his Civil Service Career was terminated

effective July 12, 1972, pursuant to an unlawful selecting-out procedure employed by NASA officials in violation of his fundamental rights as a career Civil Service employee. At the time of the 1971 downgrading, Plaintiff was 62 years of age and had completed 26 years of service; at the time of his termination, Plaintiff was 63 years of age and had completed 27 years of service. Plaintiff was selected by the NASA officials for downgrading, and later for separation, solely because of his age and years of service.

VII

The NASA officials at the Marshall Space Flight Center made no effort to enforce and protect Plaintiff's bumping rights or to establish and provide reasonable competitive levels for Plaintiff pursuant to Civil Service Commission regulations for his protection in connection with reductions-in-force. The NASA officials made no such effort as their intention was to select Plaintiff for downgrading and termination solely because of his age and service.

VIII

Plaintiff has exhausted his administrative remedies both as to the 1971 downgrading from GS-15 to GS-12, and as to his termination as a Civil Service Employee in 1972.

The Civil Service Commission's Atlanta Regional Office sustained the 1971 downgrading which decision was affirmed by the Board of Appeals and Review, dated December 7, 1972. Plaintiff filed a Petition for Reconsideration dated February 18, 1974.

Plaintiff appealed his 1972 termination to the Civil Service Commission's Atlanta Regional Office; the Atlanta Regional Office sustained the termination and, upon appeal, the Board of Appeals and Review said decision was affirmed April 23, 1973.

IX

The aforesaid NASA action (and CSC action in affirming it) in downgrading Plaintiff in 1971 was arbitrary; was due to

an abuse of discretion; and was not in accordance with law. It was without observance of procedure required by law and was unwarranted by the facts to the extent that the facts are subject to trial *de novo* by this Court as follows:

1. Said NASA downgrading action was based upon improper documentation of Plaintiff's official 201 file, which matter was seasonably brought to the attention of appropriate NASA and Civil Service Commission Officials who wrongfully refused to take any appropriate action to correct said 201 file.

2. Said NASA downgrading action was based upon incorrect statements of fact contained in the following letters, the contents of which were, during the CSC appeal, wrongfully withheld from Plaintiff in spite of his repeated requests for such information:

FROM	TO	DATE	SIGNED
AT&S-MA-PMA	CSC-Atlanta	17 Mar 72	Riggs
S&E-PE-DIR	AT&S-MA-PMB-/Mr. Boyd	16 Mar 72	Lindstrom
AT&S-MA-PMA	BAR/Mr. Berzak	12 Jul 72	Riggs
AT&S-MA-PMA	BAR/Mr. Berzak	19 Jul 72	Riggs

NASA, as stated in the CSC Atlanta Regional Office decision of 3 May 1972, originally assigned as the reason for denying Plaintiff the right to bump into position 11408 (occupied by another GS-15 employee of a lower retention sub-group than Plaintiff) that such position:

> " . . . requires primarily a Mechanical Engineering and/or Tool Engineering background. Over the years, Mr. Paetz has been primarily in the field of Electrical Engineering."

The above is completely false. Plaintiff was connected with the Saturn Booster programs from the beginning. The manufacturing research, development, and manufacture of space boosters was the work of the Fabrication and Assembly Engineering Division (Laboratory) of which Plaintiff was Chief of the Electro-Mechanical Engineering Branch. Both Plaintiff's position and position 11408 were interdisciplinary between the fundamentals of electrical and mechanical engineering. The basic project of the Laboratory had been the

development of the Saturn I and Saturn V space vehicles for the Apollo Program.

3. The aforesaid letters, listed in paragraph 2 above, were written by personnel with no direct knowledge of the facts and were wrongfully withheld from Plaintiff during his appeal thereby prejudicing his right to refute the incorrect statements of fact made in them, which facts were taken to be true and formed the basis of the Civil Service Commission decision adverse to Plaintiff.

4. During the pendency of Plaintiff's appeal to the Civil Service Commission, the incumbent of position 11408 resigned voluntarily on June 29, 1972, only about 3 months after the critical Lindstrom letter and before the two letters of Mr. Riggs, which fact was known by the NASA Officials and was brought, by the Plaintiff, to the attention of CSC. Said agencies thereupon wrongfully refused to award the position to Plaintiff.

5. The person who wrote the decision for the Board of Appeals and Review, dated December 7, 1972, was apparently not familiar with Plaintiff's position involved in the appeal as the position, throughout the said decision, is described as "Aerospace Technical" and "Aerospace Technician." The correct description is Aerospace Technology (AST), which term is used for the new NASA position classification classes and series under the Classification Act of 1949, which classification classes were approved by the Civil Service Commission. The title *technician* is wrongfully used in several paragraphs of the decision. The term *technician* indicates a *skill*. The position is that of a professional engineer.

6. The NASA Officials made no effort to establish reasonable competitive levels which inaction prejudiced the Plaintiff's rights and materially contributed to his 1971 downgrading. At said time, NASA established at Marshall Space Flight Center 303 Competitive levels for 340 employees in the grade GS-15. Of these so-called competitive levels some 281 contained only one employee. Plaintiff was the only non-veteran employee in his competitive level as MSFC.

MSFC arbitrarily has misused its authority for establishment of competitive levels by so expanding their number as to result in drastically reducing bumping rights of employees and to facilitate the center's "selecting-out" process.

For example, in the years indicated, MSFC status of competitive levels was:

Year	Number of Competitive levels	Number of Employees
1967	2300	7080
1971	2869	5600 (approximately)

X

The aforesaid NASA action (and CSC action in affirming it) in terminating Plaintiff's Civil Service Employment in 1972, was arbitrary; was due to an abuse of discretion; and was not in accordance with law. It was without observance of procedure required by law and was unwarranted by the facts to the extent that the facts are subject to trial *de novo* by this Court as follows:

1. Plaintiff's retention rights were prejudiced by NASA's excessive restrictions of his competitive level at the Marshall Space Flight Center. There were 430 GS-12 employees listed under the Occupational Code NCC-700 (Aerospace Technology Types). They were represented by 218 competitive levels. If MSFC had not arbitrarily diluted the number of competitive levels compared to the number of employees as shown in paragraph IX, subparagraph 6, above, Plaintiff would have been grouped in the same competitive levels with other employees performing similar or identical duties and Plaintiff would not have been reached for the reduction-in-force action in view of his 27 years of retention credit. In the 1972 reduction-in-force action only 131 MSFC employees were terminated out of 5,500.

2. Had the NASA Officials attempted to secure and enforce Plaintiff's rights he would not have been terminated. On the contrary, Plaintiff was terminated from his employment precisely because the NASA Officials wrongfully selected him out solely on account of his age and years of service.

XI

Plaintiff alleges there is great public interest in his case, as he is ready, willing and able to develop the evidence in his case *de novo,* not only for his benefit in the instant case but for the benefit of other similarly situated career NASA Civil Service Employees who likely will face similar wrongful, adverse reduction-in-force action in the future, based solely on their age and years of service, and who, in the usual case are unable, due to finances and otherwise, to assume the burden of establishing their claim for redress in Federal Court.

WHEREFORE, Plaintiff demands judgment of this Court reversing the aforesaid actions of NASA and the Civil Service Commission, and determining the appropriate redress, including loss of wages and reinstatement, attorney fees and other allowable expenses incurred, to which plaintiff is entitled, due to the MSFC RIF action; and appropriate correction of plaintiff's official personnel records.

/s/ Robert Paetz

Robert Paetz, Plaintiff
Route 1, Box 418
Grant, Alabama 35747

SMITH, HUCKABY & GRAVES, P.A.
By: /s/ Robert Sellers Smith

Attorney for Plaintiff
Suite 50, Central Bank Building
Huntsville, Alabama 35801
Phone: (205) 533-5040

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

June 11, 1974

Mr. Robert Sellers Smith
Attorney at Law
Central Bank Building
Huntsville, Alabama 35801

Dear Mr. Smith:

This is in reply to your letter of May 24, 1974, and in further response to the petition filed on behalf of Mr. Robert Paetz, requesting that the Commissioners of the Civil Service Commission reopen and reconsider his reduction-in-force appeal case which was decided by the Commission's Board of Appeals and Review on December 7, 1972.

We have carefully considered the information submitted in support of the request to have Mr. Paetz's case reopened. We find that it is not sufficient to indicate probable error in the decision of the Board of Appeals and Review. The file shows that the issues pertinent to the adjudication of this appeal were fully considered by the Board of Appeals and Review in reaching its decision in the case. We find no valid basis for disagreeing with the analysis and findings and decision of the Board of Appeals and Review.

With regard to your request that the Commission request additional information from Dr. William R. Lucas of the Marshall Space Flight Center regarding Mr. Paetz's petition to have this case reopened, Dr. Lucas states in his letter to you dated May 10, 1974, which you enclosed with your letter of May 24, 1974, that his (Dr. Lucas') office " . . . is unaware of any information which reflects unfavorably upon the facts and opinions set forth in all the official documentation referenced in Mr. Paetz's letter." Under the circumstances, and in the absence of any indication that you have new material evidence not readily available at the time of the decision of the Board of Appeals and Review which is

sufficient to indicate error in the decision of the Board of Appeals and Review, we find that you have presented no basis upon which this case may be reopened. The request to have this case reopened, therefore, must be denied.

Having received a final decision of the Civil Service Commission on his appeal, Mr. Paetz has exhausted his administrative appeal rights within the Commission, and there is no further action that would be appropriate for the Commission to take in his case.

I regret that our reply could not be favorable.

For the Commissioners:

Sincerely yours,

/s/ Robert B. Bates

Robert B. Bates
Assistant to the
Commissioners (Appeals)

ATTACHMENT "A"
SMITH, HUCKABY & GRAVES, P.A.
HUNTSVILLE, ALABAMA 35801

18 February 1974

Honorable Robert E. Hampton, Chairman
United States Civil Service Commission
1900 E Street
Washington, D. C. 20415

RE: Petition to Commissioners to reopen and reconsider the decision of the Board of Appeals and Review, in the matter of Robert Paetz, Aerospace Technical, Technical Management, GS-12, National Aeronautics and Space Administration, George C. Marshall Space Flight Center, Alabama, for his downgrading in the 1971 RIF.

NOTE: The BAR file incorrectly states "Aerospace Technical" and should state "AST, Technical Management" (i.e., AST stands for Aero-Space Technology, a NASA occupational group designation).

Dear Mr. Chairman:

In behalf of our client, Mr. Robert Paetz, this letter is a Petition to you and the Commissioners of the Civil Service Commission, to reopen and reconsider the above decision of the Board of Appeals and Review (BAR) as the decision involves a misapplication of established policy. Mr. Paetz's power of attorney, authorizing our firm to represent him in connection with this matter, is enclosed, marked Attachment 1.

Mr. Paetz is one of the original 118 member Rocket Team brought from Germany by Dr. Wernher Von Braun in 1945. Thereafter, he rendered some twenty-seven years of uninterrupted service in increasingly responsible positions of the United States Space Programs.

Mr. Paetz was downgraded from GS-15, which grade he had held for fifteen years, to GS-12/10, in September, 1971,

an action he accepted out of economic necessity and under the assumption of salary retention for two years. At that time there were only twenty-eight men left of the original Von Braun Team. This Nation should have had the decency to let these men retire on their own terms. The last one of them would have been retired within approximately five years. At this writing, there are only twelve of the "oldtimers" left. This Agency action taken at Marshall Space Flight Center, Alabama, by NASA officials, resulted, some nine months later, in Mr. Paetz's separation from the Federal Service as a GS-12. At the time of said downgrading, which is the subject of this Petition, Mr. Paetz had earned approximately twenty service pins and commendations, including one outstanding performance and two sustained superior performance awards.

The BAR decision, which this Petition seeks to have reopened and reconsidered, states that Mr. Paetz is an extremely capable, highly skilled and renowned aerospace engineer and has been involved in the United States space effort since its inception following the end of World War II. It further states that Mr. Paetz has had broad exposure to a variety of engineering disciplines during his lengthy work experience and could probably learn to perform effectively in almost any aerospace engineering position if given the time and training necessary.

The Board's decision, however, ratified and stamped official approval on a reprehensible selecting-out procedure employed by NASA officials in violation of Mr. Paetz's fundamental rights as a career Civil Service employee. The Board's decision involved a misapplication of established policy and should be reversed.

Through oversight, Congress and the Executive Branch of our Government failed to provide for inequity resulting against the Von Braun team members who came to this country from Germany in a time of crisis pursuant to a highly important national defense program. Mr. Paetz, along with his 117 colleagues were assimilated in the regular civil service programs and classifications. This placed each of them at a tremendous disadvantage as was later proven to be

the case in the event of subsequent reductions in force. Their initial and subsequent service was tantamount to military service on missile projects in behalf of the United States Army Ordnance Corps. Their contribution to the United States Space Program was recognized by President Kennedy as being of the highest importance as far as the prestige of the United States was concerned. He issued the highest national priority rating of DX on 18 April 1962 to the Apollo-Saturn I and Saturn V programs. No recognition has ever been given by the CSC to the obvious fact that Mr. Paetz and his distinguished colleagues had no veterans preference standing to help secure and preserve their Civil Service careers. A recent analysis of the MSFC Competitive Level Register has revealed that among the GS-15 grades at MSFC at the time of Petitioner's downgrading, there were three veterans for each non-veteran. In view of the disadvantageous position of scientists brought to this country from abroad, surely each was entitled to the benefit of full measure of protection afforded by experience, perfomance, and tenure.

Review Mr. Paetz's file and you cannot escape the conclusion that he was severely downgraded and made vulnerable to separation with little regard to his rights as a career Federal employee. Consider, for example, that NASA established at Marshall Space Flight Center 303 competitive levels for 340 employees in the grade of GS-15. Of these so-called competitive levels some 281 contained only one employee. Mr. Paetz was the only non-veteran employee in his competitive level at MSFC. Regarding competitive levels, there are no CSC guidelines for structure of competitive levels and there are no NASA or Civil Service statistics for the application of competitive levels available. The establishment of competitive levels is left to the individual agencies which can only result in inequities from agency to agency.

Two strikes were against Mr. Paetz. First, the history of his coming to the country precluded his having a status of veterans' preference. Second, his narrow, to the extent of non-existent, competitive level precluded his active competition with fellow employees for retention in grade.

Without regard to the fairness and inequity of the first two strikes, the third strike was called against Mr. Paetz in violation of his right and established Civil Service Commission policy. A subjective qualification test was applied by NASA and subsequently approved by the Civil Service Commission to deprive Mr. Paetz of the one real, substantial, legal and clearly defined right that he had. Mr. Paetz had the right to displace an employee of a lower sub-group. Thus, he, as a I-B employee with twenty-seven years service, was entitled to displace a II-B employee as provided in the Federal Personnel Manual, pages 351-30.01 and 351.31. Out of five and one-half thousand total employees, there were only three II-B positions of which there was only one he was qualified to bump into. Mr. Paetz was also precluded from retreating to his former GS-14 position because that position had been upgraded from GS-14 to GS-15.

With regard to qualifications determination, the FPM at page 351-52 provides as follows:

> "b. Qualifications determination: When an employee released from his competitive level has retention standing enough to displace another employee, the agency must determine whether he is qualified in the sense of this section. In this determination, the agency must review carefully the employee's education, training, and experience. When the agency finds him qualified in these respects, that is, in terms of the Commission's standards and requirements, it must review even more carefully to determine if he has any special skills and knowledges the position requires, as well as any less tangible attributes, such as adaptability and ability to meet and deal with others when these are required by the job. To be considered qualified and thus entitled to be place, the employee should not need a significant amount of training in the actual duties of the position, although some instructions may be necessary to familiarize him with the organizational structure and with the office policies and routines he

> will have to apply. In other words, he ought to be as well-qualified for the position as if he had already performed successfully in a similar position, because he must be able to keep the work moving without serious interruption."

The concept of interruption of the work program was further defined by FPM Letter, No. 351-7, dated 12 February 1973, as it relates to Reduction-in-Force Regulations and Instructions as follows:

> "In no case, however, does undue interruption mean mere inconvenience. Serious inconvenience and even severe interruption of the work program are often the unavoidable results of reduction in force. Undue interruption, therefore, is a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality. It naturally follows that any finding of undue interruption must be related directly to the nature of the particular work program to be affected. Depending upon the pressure of priorities, deadlines, and other demands, the ordinary work program probably would not be unduly interrupted if optimum quality and quantity of work were not regained within 90 days after the reduction in force. Lower priority programs might tolerate even longer interruption."

NASA applied a wholly subjective test in its determination that Mr. Paetz was not fully qualified to perform the duties of position number 11408, occupied by Mr. Max E. Nowak, a category II-B employee. In addition, such determination was made on a case by case basis by the agency, without objective criteria or standards, without uniformity, solely to suit the whims of the Agency and resulting in rank discriminations against senior employees and causing them to forfeit their bumping rights. The Regional Office of the Civil Service Commission sanctioned this illegal selecting-out practice and the Board of Appeals and Review affirmed it.

The result is no protection for senior employees. The discriminatory application of a subjective test to determine qualifications is the issue raised by this Petition. In order to

demonstrate its existence and operation, resort must be made to the facts of this case. However, the factual question of qualification is not the issue. The misapplication and discriminatory use of established Civil Service Commission policy is the issue.

For example, NASA, as stated in the CSC Atlanta Regional Office decision of 3 May 1972, originally assigned as the reason for denying Mr. Paetz the right to bump into position 11408 that such position:

> " . . . requires primarily a Mechanical Engineering and/or Tool Engineering background. Over the years, Mr. Paetz has been primarily in the field of Electrical Engineering."

This is completely false. Mr. Paetz was connected with the Saturn Booster programs from the beginning. The manufacturing, research, development, and manufacture of space boosters was the work of the Fabrication and Assembly Engineering Division (Laboratory), of which Mr. Paetz was Chief of the Electro-Mechanical Engineering Branch. This Laboratory is presently known as the Process Engineering Laboratory.

In the execution of his assignment as Chief, Electro-Mechanical Engineering Branch, which is a true designation of a creative engineering organization of up to 290 professional personnel, Mr. Paetz was for a number of years responsible for the total manufacturing engineering of the Laboratory, which was chiefly mechanical in nature. In this position Mr. Paetz performed the following duties, which are given as examples only:

1. Tool Engineering.
   a. Was responsible for tool design, coordination, initiation of manufacture in shops of the laboratory, initiation of procurement from industry, and scheduling.
   b. Supervised the Tool Engineering Section with up to 80 tool engineering and design personnel.
   c. Had a Tooling Unit in his Process Engineering Section.

d. Determined need and kind of tooling and issued requests for design and procurement of tooling accomplished by his Engineering Planning Section.

e. Designed and provided tools to the:

(1) Assembly shop, Mr. Nowak (named Assembly Engineering Branch) (approximately 300 different assembly tools for the Saturn I program were used).

(2) Fabrication shops, Mr. Eisenhardt (named Fabrication Engineering Branch) (approximately 870 different manufacturing tools for the Saturn I program were used).

f. Mr. Nowak (later incumbent of position 11408) was superintendent of the assembly shop and:

(1) He had no tool design responsibility.

(2) He had no tool design or tool manufacture organization.

(3) He used the tools provided.

g. The superintendent of the fabrication shops, Mr. Eisenhardt, manufactured tools which were used in his own shops and incumbent's assembly shop.

The manufacturing engineering, especially the tool engineering responsibilities of Mr. Paetz's EME Branch and the shop responsibilities of the AE Branch (Mr. Nowak) and the FE Branch (Mr. Eisenhardt), are projected in the descriptive titles of the attached organization charts, marked Attachment 2, Attachment 3, and Attachment 4.

2. Planning and Mechanical Engineering.

Developed and directed the preparation of the following comprehensive engineering and management plans, manuals and procedures for the Saturn I and Saturn V Space Vehicles:

a. The Saturn I and Saturn V Scheduling and Control Program, comprising Program and PERT Charts for overall planning as well as detailed flow charts to schedule documentation, material, components, manufacturing and assembly operations, shop orders, utilization of facilities, and major equipment, etc.

b. The Saturn I Manufacturing Plan, a series of procedures covering the manufacture, assembly and handling of major or critical assemblies and operations for the S-I Booster stage and instrument units.
c. The Saturn I Component Assembly Procedures Manual, a series of procedures developed especially for valves and control devices.
d. The Saturn I Preservation and Packaging Manual, consisting of "Procedures" for equipment and sequences of operation and "Specifications" for specifying packaging materials and requirements for short or long term storage.
e. The Parts and Material Planning and Control Program.

3. Specific Assignments.
Performed specific assignments for the Laboratory by representing the Director as:
a. Chairman of the MSFC Saturn I Manufacturing Coordination Meeting.
b. Representative to the MSFC Automatic Data Processing Systems Working Group.
c. Alternate member for the Laboratory Director of the MSFC Saturn Configuration Control Board.
d. Saturn I Monitor for the Laboratory Director regarding all aspects of the program to assure maintenance of schedules.

In Mr. Paetz's position as Chief of the Electro-Mechanical Engineering Branch, he was intimately familar with the work of the Assembly Engineering Branch of which Mr. Nowak, the II-B employee, was the Chief. This relationship is demonstrated by Attachment 5, an organization chart of the Fabrication and Assembly Engineering Division (Laboratory). Mr. Paetz's branch was responsible for the total electrical and mechanical manufacturing and assembly engineering as well as tool engineering for the entire Laboratory. This included detailed plans, schedules and directions to other major branches, including Mr. Nowak's. Thus, Mr. Nowak, as *Shop* Superintendent carried out detailed *shop* operations

from the written manufacturing engineering documentation provided by Mr. Paetz's branch.

Both Mr. Paetz's position and Mr. Nowak's position 11408, were interdisciplinary between the fundamentals of electrical and mechanical engineering. The basic project of the Laboratory involved development of the Saturn I and Saturn V space vehicles for the Apollo Program.

In the event, Mr. Nowak had vacated his position and management was seeking a replacement, no person would have been available who had more intimate knowledge and direct grasp of the duties of the position than Mr. Paetz. The affidavit of Mr. William M. McCampbell, a former employee with knowledge of the facts in issue, is attached hereto marked Attachment 6 regarding the qualifications of Mr. Paetz for the position in question.

In addition, an important point raised by Mr. Paetz while his appeal was pending before the Board of Appeals and Review was that Mr. Nowak voluntarily retired during that time and the position thus became vacant. Mr. Paetz could then have been given the position without having to bump anyone. Mr. Paetz raised this point in his letter to the BAR dated 3 July 1972, a copy of which is attached, marked Attachment 7. The BAR should have responded to the new situation and made a determination in light of the new facts.

Also, during the pendency of the appeal to the Board of Appeals and Review, reference was made to counterclaims being made by the Agency. Mr. Paetz's attempts to secure the substance of these counterclaims were ignored. Attached hereto, marked Attachment 8, is a copy of his letter to the BAR dated 29 June 1972 and its attached refutation requesting information regarding the counterclaims. The Commission never responded to this letter, never gave him the information requested therein, but simply ignored his request.

Another very substantial point raised by Mr. Paetz in his appeal was the effect the incorrectness of his 201 File had on his case.

Mr. Paetz stated in his original appeal to the Atlanta Regional Office that incorrect Notification of Personnel

Action (N of PA), Form 50, incorrect position descriptions, lack of correct position descriptions, and other omitted and insufficient information contained in his 201 File resulted in erroneous RIF evaluation and decisions regarding his separation notice dated 16 August 1971 and his downgrading notice dated 1 September 1971.

Mr. Paetz further pointed out that the four official N of PA's listed below are absolutely incorrect regarding his status, the organizations he was assigned to, his position record numbers and titles, and his duty assignments. These N of PA's and position descriptions were placed into Petitioner's 201 File by personnel officials of MSFC who knew they were false and only for the convenience of the Government. In spite of numerous requests, these incorrect documents were not corrected.

The following four incorrect N of PA's state that Mr. Paetz was Chief, Electrical Engineering Branch, having approximately 50 employees. In contradiction, Mr. Paetz says, and has documented sufficiently in his 15 October 1971 appeal, that the true fact is that his actual assignment was *Chief, Electro-Mechanical Engineering Branch* with far greater responsibility and up to 290 employees in his branch. In addition, he later became the Technical Assistant to the Director.

The four incorrect Notifications of Personnel Action, Form 50, are:

Date Grade Code	Position Number	Position Title	Organization
1 Jul 60 GS-15e GS-801 CL: GS15-11	(A-3644-S)	Supv. Research Engr. (Aeronautical Instrumentation) (Branch Chief)	F&AE DIV. (Electrical Engng. Branch

Nature of Action: Mass Transfer from ABMA to MSFC.

Note: PD A-3644-S was attached to above N of PA. Originaly I was promoted into this Branch Chief position A-3644-S on 22 Jun 58, from my Section Chief position A-2113-S

Four incorrect Notifications of Personnel Action, Form 50 (Continued):

Date Grade Code	Position Number	Position Title	Organization
7 Jul 60 GS-15e GS-801	A-2113-S	Supv. Research Engr. (Aeronautical Instrumentation) (Section Chief)	F&AE DIV. (Electrical Engng. Branch

Nature of Action: Conversion to Career Apt.

Note: This N of PA cites my old, obsolete Section Chief position as A-2113-S originally obtained 20 Jan 57.

9 Apr 61 GS-15e GS-1301 NCC: 725-01-A	AST, Flight Systems	F&AE DIV.

Nature of Action: Reassignment to show new NASA and CSC codes.

Note: This N of PA states:
"Your old and new titles and position classification series are shown above. The action does not change your status, grade, salary or organizational and duty assignments."
Therefore, this N of PA maintains incorrect assignments regarding status, organization, position records, title, and duty assignments.

8 Apr 62 ((thru 28 Dec 63)) GS-861 NCC: 725-001-0-S	Supv. ARSP Engr. Flight Systems (AST, Flight Systems)	ME DIV.

Nature of Action: Reassignment to show revision of CSC Codes.

Note: This N of PA does not correct the above three N of PA's regarding status, organization, position record, title and duty assignment.

Note: Copies of the above listed N of PA's and Position Descriptions were submitted with Petitioner's original appeal, dated 15 October 1971, and are marked Enclosure 5, Enclosure 6, Enclosure 7, Enclosure 8, Enclosure 9, and Enclosure 10.

Facts apparently ignored by the BAR include the following: On 16 May 1960 Mr. Paetz, then with the ABMA, was appointed Chief, Electro-Mechanical Engineering Branch (EME Branch), comprising four sections with nineteen units and two offices with up to 120 Civil Service and 170 support contractor personnel.

This assignment on the Saturn I Program carried over into MSFC. This EME Branch consolidated his former Electrical Engineering Branch with the Mechanical Engineering Branch (Mr. Kuers, Branch Chief), when Mr. Kuers became Laboratory Director. On 23 April 1962 a laboratory reorganization changed the EME Branch structure to accommodate the increased work load for the new Saturn V program.

The point involved in this petition for reconsideration is that for the above major phase of work, Mr. Paetz received no position description. His work carried the responsibility for electrical and mechanical manufacturing and assembly engineering; i.e., planning, process engineering, tool engineering, change control, and the programming and detail scheduling for the entire laboratory to accomplish the experimental development, manufacture and assembly of Saturn I Space Vehicle Stages, Instrument Units and their components, subsystems and system assemblies. Similarly, he performed many of the same functions for the Saturn V Program as it got under way.

Mr. Paetz contends that his position description as Chief, Electro-Mechanical Engineering Branch, should have included the following combination of position descriptions which would have indicated his qualifications to perform the duties of position 11408:

1. A-3644-S, Chief, Electrical Engineering Branch (Paetz); and,
2. Chief, Mechanical Engineering Branch (Kuers).

Mr. Paetz states that through the MSFC Personnel Office he learned that Mr. Kuers (later Laboratory Director) did not receive a position description for his Mechanical Engineering Branch although he headed this Branch for a number of years, and that no entry was made on his 80 card; however, see Mr. Kuers' position descriptions A-274-S and A-2110-S for similar descriptions at his section level (submitted with Mr. Paetz's original letter of appeal, dated 15 October 1971). Naturally the position description of Mr. Kuers' former and lesser position should be extended to reflect the new programs and the higher and added responsibilities of Mr. Paetz's Electro-Mechanical Engineering Branch.

A correctly documented 201 File for Mr. Paetz would have been sufficient, without further substantiation, to establish Mr. Paetz's qualifications to perform the duties of position 11408. The failure of the BAR to require the requested corrections prejudiced Mr. Paetz's appeal and constituted substantial error in affording him his rights as a career Federal employee. It also deprived him of reemployment rights for certain positions at the Agency and in obtaining suitable positions in other agencies or industry.

The criteria applied to support rejection of Mr. Paetz for position 11408 was that Mr. Paetz's prior work had been primarily in the field of electrical engineering and that position 11408 required primarily a mechanical engineering and/or tool engineering background.

As pointed out above, the criteria employed was superficial as Mr. Paetz's background was interdisciplinary as to mechanical and electrical engineering and their application to the Saturn projects. In addition, application of such criteria to Mr. Paetz amounted to rank discrimination, as in the past, whenever it suited the Agency's purposes, engineers of different disciplines have been interchanged.

For example, in the 1972 RIF, MSFC, for a predominantly electrical position, replaced

Mr. Duerr, a Master of Science in Electrical Engineering (MSEE) with

Mr. Bramlet, a Bachelor of Science in General Engineering (BSGE).

Mr. Duerr, the MSEE, a former German and member of the original team of Dr. Von Braun, had held since 1964 the position of GS-16 as Project Manager, Instrument Unit Project (for the Saturn I, I-B and V Space Vehicles, Apollo Program).

Mr. Duerr, a GS-16, was severely downgraded when assigned to the GS-12 position 15652, and rather than continue under this unreasonable and demoralizing condition, Mr. Duerr retired in June 1973.

According to Mr. Bramlet's own MSFC Public Information Questionnaire of August 1968, marked Attachment 9, he has held for many years technical liaison positions and named "Liquid Propulsion Systems" as his research field of specialization.

Petitioner again points out that Mr. Bramlet had many years of highly technical management experience, but that it was not in the electrical/electronic field and could not warrant the replacement of Mr. Duerr. In a similar way to Petitioner's case, an illegal, unwarranted selecting-out of an "oldtimer" occurred in the Duerr v. Bramlet case. Inconsistent, subjective and superficial qualifications criteria are the subject of this Petition. No evidence of a uniform policy or identifiable standards exists.

The decision of the Regional Appeals Examiner states that he was advised that Mr. Paetz met the basic minimum requirements for AST Positions, including position 11408.

The disqualifying distinction drawn by the Regional Office and used to deny Mr. Paetz his right to the position was as follows:

> "At the same time, we concur with the Agency determination that position 11408 requires primarily a Mechanical Engineering and/or Tool Engineering background. Over the years, Mr. Paetz has been primarily in the field of Electrical Engineering."

The Board of Appeals and Review in its decision at page four states:

> "With respect to appellant's contention that he is qualified to bump into position number 11408, a

> GS-861-15 position known as Aerospace Technician, Experimental Manufacturing Techniques, the Board has carefully considered all pertinent information shown concerning the applicable qualification standards for this position, the duties and responsibilities shown by the pertinent official position description, and the Appellant's full record of experience and training as indicated by the Appellate record."

In the first place, the title *Technician* is wrongly used here and in other paragraphs of the decision. The term *technician* indicates a *skill*.

It seems obvious that the Case Analyst of the BAR either was unfamiliar with the Petitioner's file or did not understand the technical involvement of the position he was anlayzing, thereby rendering a wrong decision.

Petitioner served as Manager and Engineer in the position involved as follows:

	Title	Code
From the position (PD 11551-S) of:		
Supervisory Aerospace Engineer (Flight Systems)	CSC	GS-861
AST, Launch Vehicle Project Mangement, GS-15/9	NASA	NCC-725-72
Deputy Project Manager, S-IC State Project	MSFC	
To the position (PD 7443) of:	CSC	GS-1301.1
AST, Technical Management, GS-12/10	NASA	NCC-770-30
Project Engineer	MSFC	

In addition, Petitioner's correct 201 File was not before the board; Petitioner was not given the opportunity to know and refute Agency arguments or contentions that he was not qualified for the position in question although he made a timely request for such information; no consideration was given to the fact that the incumbent in the position voluntarily retired while the appeal was pending even though this was

brought to the BAR's attention by the Petitioner; and no uniform criteria or standards were applied by the Agency or the BAR on the question of qualification.

The Board's further reasoning as stated in the opinion is incorrect on the question of Petitioner's qualifications. The opinion states:

> "Appellant claims qualifications for PD 11408 by virtue of assignment from approximately 7/60 to 12/63 as Chief, Electro-Mechanical Engineering Branch, a position which he claims was a predecessor position to PD 11408.
>
> "The position description of record for the above position does reflect responsibilities in the areas of tooling, fabrication, and assembly of space vehicles and components. However, this work was performed most recently approximately 8 to 9 years ago and in the rapidly advancing aerospace field the experience would be stale. Appellant's experience since 12/63 would have been only peripherally involved, if at all, with the development of tooling and manufacturing techniques, and would not have provided him with the breadth or depth of knowledge in this specialization to enable him to step into PD 11408 and perform effectively without undue interruption. The Board does not question appellant's basic qualification for GS-861 series positions at the GS-15 level, but bumping rights require more than meeting the Commission's X-118 qualification standards. They require the ability to *fully* perform the duties and responsibilities of the position without causing undue interruption of the work. Accordingly, the Board finds the appellant is not "fully qualified" as required by the Commission's reduction-in-force regulations so as to have a mandatory right to assignment to the position to which he has claimed such a right."

Petitioner, contrary to the statement contained in the above quote of the BAR decision, did not claim that his position as Chief, Electro-Mechanical Engieering Branch, was a predecessor to position 11408.

Both the Regional Office and the BAR acknowledged in their opinions that Petitioner was eligible for Position GS-861 series, including position 11408. Application of the concept of "fully qualified" was used to deny Petitioner the right to bump into a position for which he was admitted to be eligible. Applicant was Deputy Manager of the S-IB/IC Stage Project Office, PD 11551-S, at the time of the downgrading in question and thus his experience was not stale as stated in the BAR opinion. It was current. Indeed, Petitioner's position 11551-S and his former position as Chief, Electro-Mechanical Engineering Branch, were most certainly, technically and managerially, of higher demand and responsibility than the contested position 11408. Petitioner's familiarity and understanding of his own position and position 11408 was both broad and intensive. Few people anywhere possessed qualifications for position 11408 equal to those of Petitioner. When the incumbent in position 11408 left through voluntary retirement there did not exist even the disruptive factor of displacing the incumbent. When the incumbent left, there was no one at the GS-15 level in the Federal Service more "fully qualified" for position 11408 than Petitioner.

Failure to award the position to him was an error to his prejudice and constituted a misapplication of established Government policy. The Commission exists to protect individuals as well as the Government service. In this instance, the Commission ignored its duty to the individual.

Another matter Petitioner wants to raise in this Petition involves the deprivation by the Agency of his reemployment rights. For example, the Agency failed to include in the Reemployment Priority Registration Form (RPRF) dated 12 July 1972, marked Attachment 10, the following positions he is eligible for:

1. AST, Experimental Manufacturing Techniques, GS-5 through GS-15.
2. AST, Experimental Facilities and Equipment, GS-5 through GS-15.

Petitioner's experience at Peenemunde, Germany; Fort Bliss, Texas; ABMA, Redstone Arsenal; and especially his positions as:

> Chief, Electrical Engineering Branch (see Position Descriptions A-3644-S and A-2113-S; and Mr. McCampbell's affidavit), and;
>
> Chief, Electro-Mechanical Engineering Branch (no Position Description received for this more than three year duty)

make him eligible for such positions. However, apparently some MSFC officials are trying very hard "to force out the oldtimers" of Dr. Von Braun's group. It is outrageous that such a man as Mr. Paetz is not even given a chance to apply for reemployment at the Agency for certain positions he is eligible for due to the fact that the Agency knowingly made his 201 file incorrect. The Agency very likley has filled such positions without any consideration of the Petitioner.

Petitioner trusted the BAR to render a positive decision in regard to the challenged II-B position. However, in his appeal of 29 June 1972 to the BAR (last paragraph on page one thereof) he also stated:

> "I am prepared to provide your Board with additional documentary evidence to further substantiate the restrictiveness of the competitive levels established by MSFC during the 1971 reduction-in-force. Due to this restrictiveness I was deprived of my regulatory right to displace other I-B employees who had less retention credit than I."

Petitioner claims that he as Deputy Manager S-IB/IC Stage Project Office, PD 11551-S, should have been eligible to bump the GS-15 position 14077-S occupied by an employee of less tenure than Mr. Paetz, PD 14077-S attached, marked Attachment 11. It is requested that an evaluation be made to determine why Mr. Paetz was not offered this position. The BAR has not responded to this information of Petitioner.

For your information, Mr. Paetz has explained that he had two sons still in college; whereas, Mr. Nowak's only son had

graduated some five years earlier, and the incumbent of position 14077-S had three children still of school age.

Petitioner stated that Dr. Rudolf K. Festa has his appeal before the BAR and that he has filed a lengthy supplement dated 11 June 1973 dealing mainly with "discrimination against an ethnic minority group on U.S. citizens," namely the Germans at the Agency. This discrimination, petitioner states, applies in general to him also, however, he also states that he, as an "oldtimer" was hesitant to appeal on these grounds.

Regarding Mr. Paetz's separation as a result of the 1972 RIF, he stated that he has written confirmation from AFGE National Headquarters that the AFGE intends to submit his case to the U.S. District Court in the near future, now that all of the administrative appeals have been concluded.

The following point by Mr. Paetz concerning his downgrading by the 1971 RIF is based on his German upbringing. In Germany there exists a permanent *Civil Service System* where nobody who becomes a "Beamter" (career employee) is dismissed except for cause, and nobody is downgraded, once he has obtained a certain rank. As a matter of professional pride, having worked with honor and distinction, Mr. Paetz would like to retire on his own terms as a GS-15 and would strive to obtain an outstanding performance award before he leaves the Civil Service. Mr. Paetz's Placement Followup Record, Attachment 12, rates him as "outstanding" even in his downgraded GS-12 position.

President Eisenhower in his remarks at the dedication of the George C. Marshall Space Flight Center on 8 September 1960 stated:

> "May this great Center be ever worthy of its honored name."

The people of Dr. Von Braun's team certainly have contributed greatly to the Center's accomplishments. They deserve this nation's consideration.

Petitioner respectfully requests that the Commission re-open this case, perfect the record as to the facts in question, and make a redetermination on the merits.

Respectfully submitteed,

SMITH, HUCKABY & GRAVES, P.A.

/s/ Robert Sellers Smith

Robert Sellers Smith
Attorney for Petitioner, Robert Paetz

cc. Mr. Paetz

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D.C. 20415

Mr. Thomas G. Richards
American Federation of Government
Employees
Local 1858
Building 3648, Room 4
Redstone Arsenal, Alabama 35809

Dear Mr. Richards:

This is in further reference to the appeal on behalf of Mr. Robert Paetz from a decision of the Commission's Atlanta Regional Office dated December 12, 1972, sustaining the action of the National Aeronautics and Space Administration, Marshall Space Flight Center, Huntsville, Alabama, which by application of reduction-in-force procedures separated appellant from the position of Aerospace Technician (Technical Management), GS-12, effective July 12, 1972.

In the appeal you renew appellant's contentions that his competitive level was too restrictive; and that the practice of placing GS-12 positions in the trainee category is questionable. In addition, appellant contends that he was performing duties and had responsibilities which were different from those specified in his position description.

The Board of Appeals and Review has made a careful and thorough review of the record in appellant's case. With respect to appellant's contentions regarding his competitive level and the placing of GS-12 positions in the trainee category, the Board has considered the entire record in the appellant's case and finds that the decision of the Atlanta Regional Office responded to each of these issues. The Board's review of that decision further discloses that the Regional Office correctly made, and the Board concurs in the Regional Office's analysis and findings contained therein.

In regard to the contention that appellant is performing duties and responsibilities which were different from those

specified in his position description, the Board notes that in determining an employee's standing for reduction-in-force purposes the official position assignment is controlling.

An employee's official position is the position in which he is carried on the rolls and paid. In the adjudication of reduction-in-force appeals the Commission does not base its decisions on claimed performance of duties which are different from the official description of record for an employee's officially assigned position.

The Board of Appeals and Review, finding no violation of appellant's reduction-in-force rights, hereby affirms the decision of the Commission's Atlanta Regional Office.

Section 772.307(c) of the Civil Service Regulations provides that decisions of the Board are final and there is no further right of administrative appeal.

For the Commissioners:

Sincerely yours,

/s/ William P. Berzak

William P. Berzak
Chairman

cc: Mr. Robert Paetz
P.O. Box 1594
Huntsville, Alabama 35807

Director
Attention: Chief Personnel Officer
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
Huntsville, Alabama 35812

Director of Personnel
Code BP
National Aeronautics and Space Administration
Washington, D.C. 20545

Atlanta Regional Office

ATLANTA DECISION

UNITED STATES CIVIL SERVICE COMMISSION
ATLANTA REGION
OFFICE OF THE DIRECTOR, ATLANTA, GA. 30303

Mr. Thomas G. Richards
American Federation of Government Employees
Local 1858
Building 3648, Room 4
Redstone Arsenal, Alabama 35809

Dear Mr. Richards:

This refers to the reduction-in-force appeal of Mr. Robert Paetz.

Our findings with regard to the issues raised by the appellant are as follows:

The appellant claimed that his competitive level was too restrictive; that it should have included the positions in competitive levels 001, 016, and 110.

As defined in Section 351.403 of the Retention Preference Regulations, a competitive level consists of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, that an agency may readily assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program.

The position descriptions and other material related to the competitive level claim were referred for consideration by Classification Specialists in our Evaluation Division. The following is a report of their analysis and findings:

The positions in competitive level 12-001 include such duties as preparation, consolidation and adjustment of program budgets; coordination and scheduling engineering functions and activities; and manpower use planning.

The positions in competitive level 12-016 include such duties as technical monitoring and review, determination of priorities, and coordination of procurement activities.

Competitive level 12-110 includes such Engineering Liaison duties as representing the Astrionics Laboratory and acting as the official contact point and spokesman to external groups such as other MSFC laboratories, program managers and contractors for all matters concerning Astrionics Electrical Support Equipment and other ground based systems from planning through implementation.

The appellant's position, 7543, is in competitive level 12-103. Duties of this position include responsibility for development, maintenance and evaluation of project control systems for the J-2 engine program; development, installation and maintenance of engine project management reporting systems compatible with Performance Evaluation Review Techniques (PERT), line of balance, and related companion cost systems; monitoring of project costing and funding; and formulation and review of technical requirements for contracts.

While positions contained within all of the discussed competitive levels require expertise in Industrial Engineering Functions, they each require a great deal of specialized knowledge not only in different program-related area, but in differing functional areas as well.

The major concentration of effort in job number 7543 centers on project control systems, compatible with PERT, for the J-2 engine program. An intimate knowledge of project control systems, PERT and the J-2 engine program would be required for the performance of these tasks; this knowledge would not, in itself, qualify the incumbent for the performance of such administrative, engineering, liaison, technical monitoring, and procurement duties as are required in the positions in competitive levels 12-001, 12-016, and 12-110 without the necessity for a period of training and orientation;

hence, undue interruption of work. Therefore, in our opinion job number 7543 should not be included in competitive levels 12-001, 12-016, or 12-110.

The appellant claimed that the agency improperly designated certain GS-12 positions as trainee positions; that he was entitled to bump the incumbent of any one of these positions as he is a higher retention category employee.

Each agency is responsible for establishing a work force to meet the needs of its mission within its resources. The agency decides what jobs are needed and when they are to be filled, abolished, or vacated. Such matters are not subject to question by the Commission. The agency has certified that the GS-12 trainee positions in its Career Development program are encumbered by employees having PH.D. eligibility, and that the appellant does not meet qualifications requirements for entry into the program. As a matter of information, trainee positions are not exempt from reduction-in-force action if the bumping employee meets qualifications requirements for entry into the training program without unduly interrupting the work program. Thus, we find that the agency did not improperly designate the cited GS-12 positions as trainee positions.

Since our review of the facts and circumstances relating to the issues raised disclosed no violation of the appellant's rights under the Retention Preference Regulations, the appeal is denied.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U. S. Civil Service Commission
Washington, D. C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those

now in the appeal file must be submitted within the 15 calendar day time limitation.

For the Regional Director:

Sincerely,

/s/ Lyman C. Duncan, Jr.

Lyman C. Duncan, Jr.
Regional Appeals Examiner

cc:
Director
Attention: Chief, Personnel Office
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
Marshall Space Flight Center, Alabama 35812

Mr. Robert Paetz
P. O. Box 1594
Huntsville, Alabama 35807

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D.C. 20415

DECISION

IN THE MATTER OF

)	
)	
)	TYPE CASE:
)	Reduction in Force
)	Change to Lower Grade
Robert Paetz)	

INTRODUCTION

Mr. Paetz has appealed through a representative from a decision of the Commission's Atlanta Regional Office which sustained the reduction-in-force action taken by the National Aeronautics and Space Administration, George C. Marshall Space Flight Center, Alabama, whereby appellant was changed from the position of Aerospace Technician, Launch Vehicle Project Management, GS-15, to the position of Aerospace Technician, Technical Management, GS-12, effective October 3, 1971.

STATEMENT OF THE CASE

By reduction-in-force notice dated August 16, 1971 and amended on September 1, 1971, appellant was informed that as a result the reduction of permanent Civil Service positions at the Center his name had been reached for reduction-in-force action. In lieu of separation appellant was offered, and accepted, assignment to the position of Aerospace Technician, Technical Management, GS-12. The change to lower grade was effected as specified above.

ATLANTA REGIONAL OFFICE DECISION

In its decision dated May 3, 1972, the Regional Office determined that the issue of whether any contract between

the National Aeronautics and Space Administration and a private firm was improper because it had resulted in the procurement of personal services in violation of Federal personnel laws was irrelevant to, and therefore not for decision in, a reduction-in-force appeal. That office further determined that there were no positions in appellant's competitive area that were sufficiently similar in all important aspects to be included in the same competitive level with appellant's former position. It was also found that appellant received a reasonable offer of assignment. The Region concluded that the facts and circumstances relating to the issues raised by the appellant disclosed no violation of his rights under the Retention Preference Regulations.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

On appeal to the Board appellant has renewed his contention that his competitive level was too restrictive and should have been included with the jobs in competitive levels 15-067, 15-301, 15-324, 15-372, 15-406, 15-453, 15-459, 15-536, 15-137 and 15-417. Appellant also asserts that he is qualified to bump into position number 11408 and that the issue relating to "the continuance of contracting personnel to perform jobs which are identifiable as that normally and logically performed by Civil Service Personnel is an appropriate issue in this appeal and must be considered by the Board."

ANALYSIS AND FINDINGS

The Board has thoroughly reviewed the appellate record developed and relied upon by the Atlanta Regional Office to determine whether, in light of the representations to the Board, the Region was correct in concluding that the reduction in force by which appellant was affected was accomplished in compliance with applicable regulations and instructions.

Appellant's claim relating to the narrowness of the competitive levels has been examined in light of Section 351.403

of the reduction-in-force regulations which sets forth the authority and the responsibility of agencies to establish competitive levels. Under the provisions of the regulations, competitive levels are to consist of all jobs which are so similar in all important aspects that the agency can move an employee from one to another without significant training and without unduly interrupting the work program.

At the outset it is noted that, the Board recognizes that the appellant is an extremely capable, highly skilled and renowned aerospace engineer and has been involved in the United States space effort since its inception following the end of World War II. He has had broad exposure to a variety of engineering disciplines during his lengthy work experience and could probably learn to perform effectively in almost any aerospace engineering position if given the time and training necessary.

However, decisions regarding placement of positions into competitive levels are made on the basis of the duties and responsibilities of the positions and not on the qualifications of the incumbents, a point which the appellant apparently does not fully understand. In order for two positions to be properly placed in the same competitive level, the duties and responsibilities of both positions must be so similar that it could reasonably be assumed that a person who performed successfully in one position could perform equally well in the other *and vice versa.* There must be a two way interchangeability based solely on duties and responsibilities.

The Board carefully reviewed and analyzed the primary duties and responsibilities of the appellant's former position and the 10 positions which he claims should have been in the same competitive level as his position. The Board finds that there are certain similar duties in many of the positions such as responsibility for planning, coordinating, analyzing, testing, evaluating, etc. These similar sounding duties are performed in different technical and program areas which may be either more or less concerned with managerial skills or with technical expertise in a particular engineering specialization. For example, PD #11551 (appellant's former position) serves as *the technical authority* on the S-Ic Stage de-

velopment and production for the Saturn V Space Vehicle. It is hard to conceive that anyone at a comparable level in another organizational subdivision would have the scope and depth of technical knowledge of *that particular program* to step into that position and function effectively without causing undue interruption of the work.

The Board's review discloses that the positions in question at the GS-15 level have requirements for specialized technical knowledge which this Board cannot assume would be required for successful performance in any of the other positions. This is not to say that appellant could not perform in some of these positions with a minimum amount of orientation but that the Board does not find the two way interchangeability necessary for placement of any of these positions in the same competitive level.

The Board agrees with the determination made by the Atlanta Regional Office that separate competitive levels for these positions is in accordance with guidelines set forth in Section 351.403 of the reduction-in-force regulations.

With respect to appellant's contention that he is qualified to bump into position number 11408, a GS-861-15 position known as Aerospace Technician, Experimental Manufacturing Techniques, the Board has carefully considered all pertinent information shown concerning the applicable qualification standards for this position, the duties and responsibilities shown by the pertinent official position description, and the appellant's full record of experience and training as indicated by the appellate record.

This position (#11408) provides consultant services to top management of the Technology Laboratory, MSFC, NASA and prime contractors in the area of manufacturing approaches, fabrication and assembly techniques, and tooling criteria for the fabrication and assembly of space vehicle systems, including space craft boosters and related components.

The appellant has, since 1963, been assigned as Deputy Project Manager of the S-Ic Stage Project, Saturn V Space Vehicle with responsibility for planning and implementing all aspects of S-Ic Stage Project, maintaining cognizance of

the project status; planning and directing activities of project support organizations; serving as project interface to other organizations and as project management authority in resolving development and interface problems.

Appellant claims qualifications for PD #11408 by virtue of assignment from approximately 7/60 to 12/63 as Chief, Electromechanical Engineering Branch, a position which he claims was a predecessor position to PD #11408.

The position description of record for the above position does reflect responsibilities in the areas of tooling, fabrication and assembly of space vehicles and components. However, this work was performed most recently approximately 8 to 9 years ago and in the rapidly advancing aerospace field the experience would be stale. Appellant's experience since 12/63 would have been only peripherally involved, if at all, with development of tooling and manufacturing techniques, and would not have provided him with the breadth or depth of knowledge in this specialization to enable him to step into PD #11408 and perform effectively without undue interruption. The Board does not question appellant's basic qualifications for GS-861 series positions at the GS-15 level, but bumping rights require more than meeting the Commission's X-118 qualification standards. They require the ability to *fully* perform the duties and responsibilities of the position without causing undue interruption of the work. Accordingly, the Board finds that appellant is not "fully qualified" as required by the Commission's reduction-in-force regulations so as to have a mandatory right of assignment to the position to which he has claimed such a right.

On appeal to the Board appellant has renewed his contention that the agency's practice of "contracting out," an issue upon which the Region commented and found not to be germance to the reduction-in-force rights of a Federal employee, should be considered by the Board. The Region's findings on the issue of "contracting out" represent the Commission's determination and is considered dispositive of the issue; and the Board so finds.

A further review of the record discloses that the Commission's Atlanta Regional Office considered all the relevant issues which were raised on appeal to that office and correctly decided those issues. The Board concurs in the Region's findings and conclusions on those issues.

DECISION

The Board of Appeals and Review hereby affirms the decision of the Commission's Atlanta Regional Office.

Section 772.307(c) of the Civil Service Regulations provides that the decision of the Board is final and there is no further right of administrative appeal.

For the Commissioners:

/s/ William P. Berzak

William P. Berzak
Chairman

December 7, 1972

June 30, 1972

U.S. Civil Service Commision
240 Peachtree Street
Atlanta, Ga. 30303

ATT: Appeals Examiner

Dear Sir:

Under the provisions of Chapter 351, Federal Personnel Manual, I hereby appeal the reduction-in-force action I received from the Marshall Space Flight Center, NASA.

The following information, as required, is forwarded to support my appeal:

1. Name and address:	Robert Paetz P.O. Box 1594 Huntsville, Ala. 35807 Phone:205/582-3007
2. Agency and org. unit:	Marshall Space Flight Center, NASA Project Manager, Engine Program Office
3. Position title and grade:	AST, Technical Management, GS-1301.1-12
4. Nature and date of action:	Separation, effective 29 June 1972
5. Date of RIF Notice:	15 May 1972 (Inclosure 1)

6. Reasons why I believe this action is wrong:

a. Excessive restriction of competitive level:

A review of the current MSFC retention registers disclosed there were 430 GS-12 employees listed under the MSFC occupational code NCC-700 (Aerospace Technology types). They were represented by 218 different competitive levels. In my opinion, considering that GS-12 Engineers and Scientists are journeymen employees with little or no supervisory responsibilty, this tremendous spread of CL's is absurd. The guidance for establishing CL's, as set forth in Subchapter

4-3a and b, Chapter 351, FPM, is concise. In fact, reference states, "A level may consist of only one job when that job is so nearly unique that it is not interchangeable with similar jobs."

I have made an in-depth study and comparison of GS-12 AST type job descriptions and established CL's to substantiate my basis for my appeal. The study encompasses three areas of technology, namely, AST, Technical Management (my discipline), AST, Experimental Manufacturing Techniques and AST, Experimental Facilities and Equipment. (Refer to inclosure 2). I maintain that had the CL's been established in accordance with governing Civil Service Regulations, I would have been grouped in the same CL with other employees performing similar and/or identical duties. Hence, I would not have been reached for a reduction-in-force action — *I have 27 years of retention credit.*

b. Retention of an employee in a lower subgroup in a job for which I consider myself qualified:

The retention registers reflect three GS-12 employees as follows:

John R. Glaese, II-A, CL#900, 861 Series
Thomas J. Wdowiak, II-B, CL#901, 1301.1 Series
Stephen W. Winder, II-A, CL#904, 861 Series

These employees are identified on the retention registers as "Trainees" and therefore, exempt from the current reduction-in-force. I question that status at the GS-12 journeyman level. Two of these employees have Doctorate degrees and yet, are considered "Trainees." I am in the 1301.1 Series and qualify for a variety of positions in the 861 Series. Therefore, I contend I should be permitted to displace one of these Career-Conditional employees.

Further, I question the validity of this "Trainee" classification for these individuals. I single out Dr. Winder, as an example and I refer you to Dr. Gerhard Reisig's notorized deposition, inclosure 3. How can this employee be considered a Trainee?

Referring back to a above, I have another point to offer for consideration. During the previous reduction-in-force at MSFC in 1971, the Personnel Office advised me that at the

lower grade levels, GS-12 for example, there are less competitive levels. I was told the higher the grade the more competitive levels. I was questioning the narrowness of the competitive levels at the GS-15 level at the time — this related to my downgrade from a GS-15 position to my present GS-12 position. As evidence above, I was given misleading information.

I request I be granted a hearing on my appeal. A member of Local 1858, AFGE will be my representative.

Sincerely,

/s/ Robert Paetz

Robert Paetz

cc. Local 1858, AFGE

RIF - 1972 at MSFC - NASA

Robert Paetz
Soc. Sec. #418-60-4510
Payroll #3186

Enclosures to Appeal, dated 30 June 1972

Document Title	Date	Enclosure #
Separation Letter	15 May 72	1
Study of Competitive Levels (CL's) in the GS-12 Aerospace Technology (AST) jobs:		
- AST, Technical Management		2a
- AST, Experimental Manufacturing Techniques		2b
- AST, Experimental Facilities & Equipment		2c
Notarized deposition by Dr. H. R. Reisig	29 Jun 72	3

AST, TECHNICAL MANAGEMENT

Grade: GS-12; CS-Series: 1301.1; NCC: 770-30

No.			Functions			Practical Consolidation 5 Positions				
No.	C.L.	Pos. No.	Primary	Secondary	Tertiary					
1	001	03254	Engineering Liaison	Contract Management		X				
1	001	01478	Budget/ Schedules	Contract Management	Financial Performance					X
1	001	11067	Manpower Utilization						X	
1	008	01998	Budget/ Schedules	Management Systems	Engineering Liaison			X		
1	016	15156	Contract Management	Budget/ Schedules			X			
1	016	14551	Contract Management	Engineering Liaison		X				
1	103	07543	Management Systems	Contract Management		X				
1	103	13201	Management Systems	Contract Management		X				

No.			Functions			Practical Consolidation 5 Positions	
No.	C.L.	Pos. No.	Primary	Secondary	Tertiary		
1	104	13775	Budget/ Schedules	Engineering Liaison		X	
1	110	14580	Engineering Liaison	Contract Management			X
2	001	09692	Budget/ Schedules	Engineering Liaison	Management Systems	X	
1	618	12507	Budget/ Schedules	Manpower Utilizaton	Contract Management	X	
13	8	12					

AST, EXPERIMENTAL MANUFACTURING TECHNIQUES

Grade: GS-12; CS-Series: 861 NCC: 725-20

No.	C.L.	Pos. No.	Functions Primary	Secondary	Tertiary	Practical Consolidation 7 Positions
1	077	02415	Mechanical Design		X	
1	077	02415				
1	077	02415				
1	479	13678	Ceramic Utilization			X
1	483	10636	Manufacturing Specialst	Contract Management	X	
1	489	11725	Mechanical Design		X	
1	489	11725				
1	498	15334-S	Surface Treatment	Paint, metal finish Photo Fab.		X

No.	C.I.	Pos. No.	Functions			Practical Consolidation 7 Positions				
			Primary	Secondary	Tertiary					
1	547	14277	Mechanical Design	Engineering Liaison		X				
1	624	13381	Electrical Design	Contract Management	Engineering Liaison				X	
1	625	12424	Manufacturing Specialist	Contract Management			X			
1	635	12424								
1	626	14552	Metal Joining	Contract Management				X		
1	627	11397	Contamination Control	Contract Management						X
1	628	10706	Metal Finishing	Polymeric Bonding				X		
	629	04490	Fasteners	Contract Managment			X			
16	12	12								

AST, EXPERIMENTAL FACILITIES AND EQUIPMENT

Grade: GS-12; CS-Series: 801; NCC: 740-01

No.	C.L.	Pos. No.	Functions		Practical Consolidation 3 Positions		
			Primary	Secondary			
1	021	15483	Facilities/ Construction	Engineering Liaison	X		
1	022	02085	Electronic Packaging	Contract Management		X	
1	022	15247	Electronic Packaging	Contract Management		X	
1	023	07006	Facilities	Engineering Liaison	X		
1	232	14658	Electrical Facilities	Engineering Liaison			X
1	235	02383	Facilities	Contract Management	X		
1	236	02376	Facilities/ Construction	Contract Management	X		
7	6	7					

A-161

UNITED STATES CIVIL SERVICE COMMISSION
ATLANTA REGION
Merchandise Mart Building
240 Peachtree Street, N.W.
Atlanta, Georgia 30303

Mr. Robert Paetz
Post Office Box 1594
Huntsville, Alabama 35807

AT AD-150 7-63

UNITED STATES CIVIL SERVICE COMMISSION
ATLANTA REGION
OFFICE OF THE DIRECTOR, ATLANTA, GA. 30303

May 3, 1972
APPL:IRH:mhv

Mr. Richard L. Shaw, Representative
American Federation of Government Employees
West Clinton Building, Room 314
2109 Clinton Avenue, West
Huntsville, Alabama 35805

Dear Mr. Shaw:

This refers to the appeal of Mr. Robert Paetz regarding his change to a lower grade as a result of reduction-in-force action.

Our findings with regard to the specific issues raised are as follows:

The appellant claimed that the reduction-in-force action was improper in his case because of the contracting-out practices of the employing agency.

The issue of whether any contract between NASA and a private firm is improper because it has resulted in the procurement of personal services in violation of Federal personnel laws is irrelevant to, and therefore not for decision in, a reduction-in-force appeal. Even if a contract entered into by NASA is found to be improper, this does not make the employees of the private firm Federal employees and thus "competing employees" under the law and the Civil Service regulations (5 U.S.C. 3502; 5 C.F.R. 351.203(a)). Since employees of the private firm cannot be "competing employees", a Federal employee has no right to displace or "bump" an employee of the private firm; in similar manner, an employee of the private firm has no right to displace or "bump" a Federal employee when reductions in force occur in the private firm. In any case, if the contract between NASA and the private firm were found to be improper, NASA would have the opportunity

of correcting the impropriety. This correction could take the form of terminating the contract, or requiring that the services under the contract be performed properly in the future. If the contract were terminated, this does not necessarily mean that NASA would have the services performed by Federal employees, and even if NASA decided to do so, the vacancies created by this decision would not be required to be filled by employees affected by the reduction in force. For these reasons, there is no basis for acting on the issue of the propriety of contracting out by NASA in connection with a reduction-in-force appeal.

The appellant claimed that his competitive area was too narrow; that the Agency had arbitrarily excluded other major organizational segments of the Agency from the competitive area.

The standard for a competitive area, as defined in Section 351.402(b) of the Civil Service Regulations, is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area. The Agency has stated that the competitive area consisted of all its employees at the Marshall Space Flight Center, Huntsville, Alabama.

The appellant claimed that his competitive level was too restrictive; that it should have been combined with positions in competitive levels 15-067, 15-301, 15-324, 15-362, 15-372, 15-406, 15-453, 15-459, 15-536, 15-537 and 15-417.

As defined in Section 351.403 of the Retention Preference Regulations, a competitive level consists of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, that an agency may readily assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. In this regard, the appellant's position description and those of the posi-

tions assigned to the above competitive levals and identified by the appellant, were obtained from the Agency along with appropriate organizational charts and charters and the Agency's explanation for its competitive level determinations. We requested that Personnal Management Specialists in our Evaluations Division review the material obtained and advise us as to whether any of the positions should have been included in the competitive level with the appellant's position.

They advised us that their independent review disclosed that none of the positions were sufficiently similar in all important aspects to be included in the competitive level with the appellant's position.

The appellant claimed the right to bump Mr. Max E. Nowak, a category II-B employee who occupied position No. 11408.

An employee's bumping rights extend laterally and downward. This is his right to displace a person who occupies a position for which the employee is qualified, when the person being bumped is in a lower retention subgroup. In this connection, we asked Personnel Staffing Specialists in our Staffing Division to review the position description for job No. 11408, the qualifications standards for the position and a brief of the appellant's experience and training in the light of the claims made by the appellant and the Agency's response thereto, and advise us with respect to whether the appellant's experience meets the minimum qualification requirements for the position and, if so, whether he could be expected to perform all the duties of the position without significant training and without *undue interruption to the Agency's work program.* They advised us that the basic minimum requirements for AST positions, including position No. 11408, have been met. However, they stated:

"At the same time, we concur with the agency determination that position No. 11408 requires primarily a Mechanical Engineering and/or Tool Engineering background. Over the years Mr. Paetz has been primarily in the field of Electrical Engineering.

"There are claims and counter claims as to qualifying experience — erroneous position descriptions etc. The appellant claims to have served in an identical job to position No. 11408 back in 1962-1963. The agency counters that this position (11408) was not even established until May 29, 1969. The job titles are not the same nor are the duties identical."

It is noted that the appellant acknowledged that his official assignments of record did not show that he had occupied the position. *In a reduction in force, the position descriptions of those positions to which an employee has been officially assigned controls.* However, our Personnel Staffing Specialists advised us, further, that:

"The appellant's experience as Chief, Electro-Mechanical Engineering Branch in 1962 would, of course, have given the appellant an exposure to problems in Mechanical Engineering but we question whether this would be sufficient to establish him as an "expert" with a depth of knowledge and "expertise" in the fields of Mechanical Engineering and Tool Engineering that would be required to serve as an advisor in "Experimental Manufacturing Techniques."

"After due consideration of the appellant's experience and training, we concur with the agency determination that Mr. Paetz is *not* "as well qualified for the position as if he already performed successfully in a similar position."

The appellant claimed that he is a naturalized citizen and he was improperly denied assignment rights to "Excepted" positions occupied by aliens.

Section 351.403 of the Civil Service Regulations provides that each agency shall establish separate competitive levels for competitive positions as distinguished from excepted positions. Section 351.705 prohibits an agency from assigning an employee in the competitive service to a position in the excepted service through reduction-in-force action.

It is noted that the appellant alleged that the ratio of veterans to non-veterans at the GS-15 level is 15 to 1. However, this matter is not relevant to this case.

Our review of the facts and circumstances relating to the issues raised by the appellant disclosed no violation of his rights under the Retention Preference Regulations. Accordingly, his appeal is denied.

Unless this decision is further appealed within 15 calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. 20415. Any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies. In addition notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

For the Regional Director:

Sincerely,

/s/ Lyman C. Duncan, Jr.

Lyman C. Duncan, Jr.
Regional Appeals Examiner

cc:
Director
Attention: Chief, Personnel Office
George C. Marshall Space Flight Center
National Aeronautics and Space Administration
Marshall Space Flight Center, Alabama 35812

Mr. Robert Paetz

October 15, 1971

Robert Paetz
PM, Engine Program Office
George C. Marshall Space Flight Center
Marshall Space Flight Center, Ala. 35812

Personal Mailing Address:

Robert Paetz
P. O. Box 1594
Huntsville, Alabama 35807

Mr. Hammond Smith, Director
Atlanta Region
U. S. Civil Service Commission
Atlanta Merchandise Mart
240 Peachtree Street NW
Atlanta, Georgia 30303

Subject:
Appeal regarding RIF Actions by MSFC against Robert Paetz, Payroll Number 3186, Social Security Number 418-60-4510; which actions resulted in:

Enclosure No.

a. Separation Notice, dated August 16, 1971. — 1

b. Downgrading Notice in Lieu of Separation, dated September 1, 1971, to GS-12/10, from GS-15, obtained in 1956. — 2

Pursuant to the provisions of Chapter 351, FPM-1, I desire to appeal the Reduction-in-Force actions contained in subject a. and b.

Permit me to present my appeal by discussing the Civil Service System in general and the RIF actions in specific.

General Appeal Remarks

I am one of the original 118-member Rocket Team, of whom only about 35 are left at MSFC, brought from Germany by Dr. Wernher von

Subject: Enclosure No.

Braun in 1945, and have worked in the U. S. missile and space programs ever since — a total of more than 26 years of uninterrupted service in increasingly responsible positions.

The attached documents may interest you:

— MSFC Public Information Questionnaire, giving details of my personal data and professional development. 3

— Newsweek article, July 7, 1969, "Where Are They Now?" 4

While working for the Army and MSFC, I personally hired and trained, either personally of thru subordinate supervisors, more than 400 Civil Service and support contractor employees.

When the von Braun Team was transferred from Ft. Bliss, Texas, to Redstone Arsenal, Huntsville, Alabama, in 1950, I was the first to arrive here for permanent stay.

It seems to me that *adverse actions like mine* will have a harmful effect on the Civil Service System in general, if known publicly.

One reaction I received from an outstanding Civil Service employee the morning after I received my separation notice was that this employee advised his two sons, by citing my case, to "*NEVER join Civil Service* unless you are veterans."

My personal reaction is that of bewilderment. If, out of 5,700 employees only a minor number of 135 are laid off and an employee having more than 26 years of uninterrupted service receives a separation notice, then there is something basically wrong, or missing, regarding Civil Service regulations, or the execution thereof.

In following up on my separation I have learned a few things about Civil Service which were unknown to me, in spite of my handling quite a

number of personnel and numerous personnel questions and papers connected therewith, for example:

— There are 303 competitive levels for 340 employees in the GS-15 grade here. Of these, 281 competitive levels are for individual positions.
(Seems excessive.)

— Regarding the number of competitive levels in various GS grades, there are:
  - o No Civil Service Commission Guidelines, either nationally or locally.
  - o No NASA or national statistics available. Reference: RIF Counselling Session at MSFC on August 20, 1971.

— The ratio of veterans to non-veterans is approximately 3 to 1 for GS-15, less for lower grades.

— The imbalance of veteran to non-veteran employees is constantly changing as each reduction in force occurs. Since 1967 this imbalance has increased at an alarming rate at all grade levels.

Out of what I have learned above, I must conclude that I have been misled, to put it mildly, regarding a "Career" or "Permanent" Civil Service Employment. I consider it a cruelty, after having served 26 years honorably and given my best professional years to the Service, to be discarded so easily. To find industrial employment now, at the age of 62, is practically impossible, it being well known that industry basically does not hire above age 45.

It appears that steps must be taken to establish some method that affords non-veterans some standard of Civil Service permanency. For instance, in many countries, after an employee has completed 15 years of service, he is placed in a

category where only action for cause will remove him from his position. Employees who devote this amount of service to Government employment need this guarantee to offset their loss of desirability to the industrial market, due to age, specialization, etc.

The Civil Service Commission has failed to issue guidelines, and especially failed to conduct information sessions for the general employee regarding Civil Service Law, Regulations, Practices, etc., and how these will affect employment, altho thousands of training courses on all kinds of other subjects have been held.

Had the Civil Service Commission conducted such employment information sessions, I, a non-veteran, could have recognized the fact that there is actually no Career or Permanent Civil Service employment, especially for non-veterans, as commonly believed. This prevented me from seeking timely industrial employment where pay is greater and loyalty to proven employees is great.

In fairness to employees, the Civil Service Commission should have:

— Issued a Directive on Competitive Level Structure, similar to directives for the GS Grade Structure.

— Informed employees of the method for establishing competitive levels. (Such method is not known to general employees, nor to the supervisors who must write position descriptions. They are thus unaware of the utmost importance of an accurate content of position descriptions and its effect — many years later — on RIF actions.)

— Informed employees of how unregulated establishment of competitive levels by individual agancies affects retention possibilities.

— Informed employees of the ratio of veterans to non-veterans in various GS grades and its effect on retention of non-veterans in each grade.

For a number of years, no Position Descriptions were in existence at MSFC, making it difficult, if not impossible, for present personnel officials to properly evaluate 201-Files as to bumping and retreat rights of employees. This applies to my case where, in addition, erroneous Notices of Personnel Actions were issued and placed in my 201-File, where they are still uncorrected. As I remember it, the *Period of No Position Records* resulted from NASA Headquarters wanting to establish the Aerospace Technology (AST) system, which stopped the issuance of Position Descriptions at this Center.

The incorrect personnel actions in my specific case were related to a reorganization at the very beginning of the Saturn I Program, which happened at the same time as the transfer of 4,500 employees from the ABMA of the Army to the newly established G. C. Marshall Space Flight Center, and to the sheer volume of personnel transfer documentation connected therewith.

As an example in my case, the lack of official action (Time of No Position Records) as well as placing incorrect Notifications of Personnel Action into my 201-File *by the Agency* makes it impossible for me to keep my 201-File up to date.

The Commission's contention, *which I just learned today,* that it is the employee's responsibility to maintain his 201-File is under above circumstances difficult to maintain and should be corrected.

Appeal Specifics

Specific Allegations of procedural and merit defects are as follows:

1. *Competitive Area*

   Marshall Space Flight Center arbitrarily narrowed the competitive area previously established. This denies appellants their rights under Chapter 351, FPM-I. Though each segment of MSFC located outside the Huntsville area is separate, the organizational control, administration, technical direction, and mission responsibilities, as outlined in organizational charters, remains at MSFC in Huntsville. The only autonomy the activities have is related to the Reduction-in-Force.

   The declared competitive area is the G. C. Marshall Space Flight Center, yet, because of the action taken by management to place like positions, located in different major organizational segments, in separate competitive levels, management has established "Sub-Competitive Areas."

   To establish separate competitive levels between major organizational segments in fact establishes sub-competitive areas within a competitive area and eliminates competition and violates bumping and retreat rights of employees.

   A review of the Register will reveal that the Agency made maximum utilization of competitive levels occupied by only one individual.

2. *Contractor Operations*

   Marshall Space Flight Center continues to utilize contractor personnel in performing duties normally and formerly assigned to civil servants. Reduction of contractor costs would

negate requirements of Reduction-in-Force for budgetary reasons as claimed.

3. *Offer of Equitable Position*

   I was not offered positions that I am qualified to fill at the GS-15 level, based upon my actual qualifications and tenure.

   It also should be noted that after all my years of service and my action to obtain U. S. Citizenship, when this Reduction in Force occurred, I find myself in the unusual position that my action in obtaining citizenship works to my detriment.

   Fellow employees who arrived with me or thereafter and who retained their alien status are retained in an "Excepted" status and non-competitive.

   Even though my qualifications could easily place me in one of these GS-15 positions, I am not even afforded this consideration.

4. *Excessive Restriction of Competitive Levels*

   There are 303 competitive levels containing 340 employees in NASA Classification Codes in the GS-15, 700 Series, retention register, of which 281 contain only one (1) employee.

   The MSFC Personnel Manual (3.1004) states: "A competitive level consists of all positions within this Center which are sufficiently alike in duties, responsibilities, pay systems, and working conditions, that the incumbent of any of them could readily be shifted to any of the positions without a change in the terms of his appointment or undue interruption of the work program."

   The NASA Classification Codes more nearly meet this requirement than the recently, in 1966 at MSFC, instituted competitive level system.

As an example, I contend, the following competitive levels should be combined into a single competitive level:

— Competitive Levels #:

054-15 This list was corrected with letter (Form CSC 508) after 20 Jan 72

If I understand correctly, the Civil Service Commission has delegated to MSFC the right to establish competitive levels.

During the RIF Counselling Session at MSFC on August 20, 1971, I learned:

— The Civil Service Commission has not issued guidelines to the Agency as to how competitive levels should be established, e.g., a Competitive Level Structure, similar to a GS grade structure.

— No national or agency statistics are available regarding the number of competitive levels at various grades used at various installations.

I contend that the unregulated establishment of competitive levels at various installations results in:

— Inequities from agency to agency.

— Inequities in various GS grades.

Since the agencies have established competitive levels in an unrestricted manner, only an impartial investigation by the Civil Service Commission at the various NASA and other agencies will be able to determine if the various systems used by the agencies are comparable and equitable to employees.

5. *Incorrect and Incomplete 201-File*

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— Incorrect Notification of Personnel Action (Form 50), lack of Position Descriptions, and other omitted and insufficient information contained in my 201-File resulted in erroneous RIF-evaluation and decisions expressed in the attached documents:

— Separation Notice dated August 16, 1971. 1

— Downgrading Notice dated September 1, 1971. 2

In addition to other deficiencies, *the four Notifications of Personnel Action listed below are absolutely incorrect* in regard to the organizations I was assigned to and in regard to the Position Record numbers and titles.

Copies of Form 50's and Position Descriptions attached.

Date Grade Code	POSITION Number	Title	Organization	
1 Jul 60 GS-15e GS-801	(A-3644-S)	Supv. Research Engr. (Aeronautical Instrumentation) (Branch Chief)	F&AE DIV. (Electrical Engng. Branch)	5/6
	Nature of Action: Mass Transfer ABMA to MSFC.			
7 Jul 60 G-15e GS-801	(A-2113-S)	Supv. Research Engr. (Aeronautical Instrumentation) (Section Chief)	F&AE DIV. (Electrical Engng. Branch)	7/8
	Nature of Action: Conversion to Career Appt.			
9 Apr 61 GS-15e GS-1301 NCC: 725-01-A	None	AST-Flight Systems	F&AE DIV.	9
	Nature of Action: Reassignment to show new NASA and CSC codes.			

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Date Grade Code	POSITION Number	Title	Organization	
8 Apr 62/ 28 Dec 63 GS-861 NCC: 725-001-0-S	None	Supv. ARSP Engr. Flight Systems (AST-Flight Systems)	ME DIV.	10

Nature of Action: Reassignment to show revision of CSC codes.

The four incorrect Form 50's above state that I was Chief, Electrical Engineering Branch, having approximately 50 employees.

However, my *actual assignment* was *Chief, Electro Mechanical Engineering Branch* with far greater responsibility and up to 290 employees. Later, I became Technical Assistant to the Director.

1 Jul 60 thru 8 Sep 63, Actual Assignment

On 16 May 60, while still with ABMA, I was appointed Chief, Electro-Mechanical Engineering Branch, (EME Branch) comprising 4 Sections with 19 Units, and 2 Offices, with up to 120 Civil Service and 170 Support Contractor personnel. This assignment on the Saturn I Program carried over into MSFC.

This EME Branch consolidated my Former Electrial Engineering Branch with the Mechanical Engineering Branch (Mr. Kuers, Branch Chief), when the latter became Laboratory Director.

On 23 Apr 62, a Laboratory reorganization changed the EME Branch structure to accommodate the increased workload for the new Saturn V programs.

For this major phase of work I received no position description. My work carried the responsibility for electrial and mechanical man-

ufacturing engineering (planning and process engineering), tool engineering, change control, and the programming and detail scheduling for the entire Laboratory in order to accomplish the experimental development, manufacture and assembly of Saturn I Space Vehicle Stages, Instrument Units and their components, subsystems and system assemblies. Similarly, I performed many of these same functions for the Saturn V Program as it got underway.

My position description as Chief, Electro-Mechanical Engineering Branch, should have been a combination of Position Descriptions:

— A-3644-S, Chief, Electrical Engineering Branch (Paetz) and
— Chief, Mechanical Engineering Branch (Kuers).

Through the MSFC Personnel Office I learned, however, that Mr. Kuers, (later Laboratory Director) did not receive a position description for his Mechanical Engineering Branch, although he headed this Branch for a number of years; neither was an entry made on his 80-card.

The latest position descriptions for Mr. Kuers, are A-274-S, and A-2110-S which most nearly describe the Mechanical Engineering Branch activities and express Experimental Fabrication and Development efforts.

9 Sep 63 thru 28 Dec 63, Actual Assignment

On 9 Sep 63, I was appointed "Technical Assistant to Director" and transferred to the Technical & Scientific Staff Office, Manufacturing Engineering Division.

My specific assignments were to head the Reliability Office, which was staffed with 15 engineers and professionals, and the Automatic Data Processing Program.

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In support of the above statements regarding my assignments, as well as those of Mr. Kuers, whose activity, when combined with mine, became the Electro-Mechanical Engineering Branch, I submit and attach the following documentation:	
— Disposition Form to Distribution, dated 16 May 60, forming the Electro-Mechanical Engineering Branch (EME), headed by Mr. Paetz and combining the Electrical and Mechanical Branches.	11
— Memorandum to Distribution, dated 9 Dec 60, assigning Scheduling and Programming Functions to the EME Branch.	12
— Organization chart, dated 17 Jan 61, for EME Branch showing 4 sections with 19 units and 2 offices.	13
— Staffing chart, dated 20 Apr 62, EME Branch showing 289 personnel.	14
Staffing chart, dated 10 Mar 60, Electrical Engineering Branch showing 50 personnel.	15
— Job Description A-274-S (Kuers) for Chief, Manufacturing Engineering and Control Section (later Mechanical Engineering Branch).	16
— Job Description A-2110-S (Kuers) for Chief, Manufacturing Engineering and Control Section (later Mechanical Engineering Branch).	17
— Organization Manual, 1958, of Fabrication and Assembly Engineering Laboratory, ABMA, containing organization charts to show existence of the Mechanical and Electrical Engineering Branches.	18
— Organization Manual, 1959, of Fabrication and Assembly Engineering Laboratory, ABMA, containing:	19

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— Staffing chart, showing Mr. Kuers as Acting Chief, Mechanical Engineering Branch

— Electrical and Mechanical Engineering Branch organization chart and mission descriptions expressing responsibilities in experimental development of manufacturing techniques.

— Organization Manual, November 1960, of Fabrication and Assembly Engineering Division, NASA - G. C. Marshall Space Flight Center, containing various organization charts and charters including the newly formed Electro-Mechanical Engineering Branch, again expressing experimental activities. 20

— Memorandum, dated 3 Sep 63, subject Reorganization, assigning the Laboratory's Reliability Activity to Mr. Paetz (Technical & Scientific Staff). 21

— Memorandum, dated 25 Sep 63, subject Reorganization, showing Mr. Paetz as Technical Assistant to Director (Technical & Scientific Staff). 22

Since I did not receive position descriptions for my assignments from 1 Jul 60 thru 8 Sep 63, as Chief, Electro-Mechanical Engineering Branch, and since position descriptons as well as the attached organization charts and mission descriptions, cited above, do not describe in sufficient detail, if at all, the activities required for correct evaluation by personnel officials to properly determine bumping and retreat rights to positions from, or thru, which I was promoted, including positions substantially the same, I am listing below, *as examples only,* activities not easily recognized in position and mission descriptions.

In execution of my assignment as Chief, Electro-Mechanical Engineering Branch:

(1) Developed and directed the preparation of the following comprehensive engineering and management plans, manuals and procedures for the Saturn I and Saturn V Space Vehicles.

- The Saturn I and Saturn V Scheduling and Control Program, comprising program and PERT charts for overall planning as well as detailed flow charts to schedule documentation, material, components, manufacturing and assembly operations, shop orders, utilization of facilities and major equipment, etc. The decimal system developed for these schedules was the basis for computer reports to schedule material and component delivery, shop operations and control.
- The Saturn I Manufacturing Plan, a series of procedures covering the manufacture, assembly and handling of major or critical assemblies and operations for the S-I booster stage and instrument units.
- The Saturn I Component Assembly Procedures Manual, a series of procedures developed especially for valves and control devices.
- The Saturn I Preservation and Packaging Manual, consisting of "Procedures" for equipment and sequences of operatons and "Specifications" for specifying packaging materials and requirements for short or long term storage.

  This program is unique since it is directly "shop" oriented and contains exact instructions to personnel "how and with what" to preserve and pack; it is complete

in itself, additional documents not being required.

- The Parts and Material Planning and Control Program comprising:
  - — The Component Modification List (CCL), a catalogue of material classification and identification.
  - — The Hardware and Materials List, an automatic data processing (ADP) listing of materials required for the manufacture of space vehicles.
  - — The Mechanical Ordering Technique, a mechanized ordering system based on above CCL.

(2) Performed specific assignments for the Laboratory by representing the Director as:

- — Chairman of the MSFC Saturn I Manufacturing Coordination Meeting
- — Representative to the MSFC Automatic Data Processing Systems Working Group
- — Alternate member of the MSFC Saturn Configuration Control Board
- — Saturn I Monitor for the Laboratory Director regarding all aspects of the program to assure maintenance of schedules.

I would like to cite another example which makes it difficult for personnel officials to determine bumping and retreat rights, including that to positions substantially the same.

This example is the frequent change of names, even of major organizations, caused by reorganizations, e.g. the missions of the present PE&PT Laboratory remained substantially the same, altho programs and projects changed. This Laboratory has had the following names:

— Development Fabrication Branch

— Development Fabrication Laboratory — Enclosure
— Fabrication Laboratory — No.
— Fabrication and Assembly Engineering Laboratory (F&AE-LAB)
— Fabrication and Assembly Engineering Division (F&AE-DIV)
— Manufacturing Engineering Division (ME-DIV)
— Manufacturing Engineering Laboratory (ME-LAB)
— Product Engineering and Process Technology Laboratory (PE&PT-LAB)
— Process Engineering Laboratory (S&E-PE) since FEb 72.

In the same manner as the name of the major organizations (the Laboratory) changed, so changed the names and titles of:

— Subordinate organizational segments
— Mission descriptions
— Position descriptions

As in the beginning under the name "Development Fabrication Branch," as now under the name "Product Engineering and Process Technology Laboratory," the mission and functions are still the same, namely:

"To conduct manufacturing research, to develop new technology and novel manufacturing methods, by applying experimental manufacturing techniques, and to produce experimental prototypes and models.") 23) 24
(See attached Laboratory mission descriptions of 1958, 1959, 1960 and 1971)) 25) 26

Only the programs and projects change. Formerly, the Laboratory performed such activities to produce guided missiles and space boosters such as the Restone, Mercury and Jupiter guided missiles, and the Saturn I and Saturn V space

boosters, and today: the Apollo Telescope Mount, the Multiple Docking Adapter, the ATM Camera Magazine, the Apollo Flyback Experiments, Material Processing in Space Experiments, Stratoscope II, and others. Enclosure No.

In another example, for my assignment under Job Description A-2113-S and A-3644-S, attached, as Chief, Electrical Engineering Section and Branch, from 20 Jan 57 thru 30 June 60, I would like to show that it is difficult for personnel officials to properly determine bumping and retreat rights, including those in substantially the same positions. The attached Disposition Form, dated 12 May 60, contains a list of *more than 100 projects of experimental manufacturing techniques,* conducted under my supervision and required for execution of my Section and Branch activities, which are difficult to recognize in job descriptions. 8/6 27

Summary

I contend that the determination resulting in my separation and downgrading notices was made by personnel officials from incorrect and incomplete information contained in my 201-File, as described above in detail and summarized below:

— Incorrect Notification of Personnel Actions
— Missing Notification of Personnel Actions for actual assignments
— Missing Position Descriptions
— Position Descriptions not sufficiently descriptive for non-techical personnel officials to recognize actual job requirements involved.

I request that a re-evalution be made of the adverse personnel actions, based on the correct information as set forth above and attachments thereto.

I request that correct Notifications of Personnel Actions be issued for my actual assignments from 1 Jul 60 thru 28 Dec 63 including Position Descriptions and placed into my 201-File. Enclosure No.

I request that the incorrect Notification of Personnel Action be removed from my 201-File.

I request that an impartial investigation be made of groundrules and practices used in establishing competitive levels at the NASA agencies, to determine equitable treatment of NASA employees.

I understand the necessity of eliminating my present job. Management cannot maintain two deputies in an office of a declining program. However, a 26-year employee should never receive a separation notice since the Civil Service system is based on seniority, and later, a more equitable offer should have been made.

In my present organization, Program Management, I have held only one, my present, position, and apparent no other equitable position could be offered in that organization.

Since most of my previous experience, from 8 Sep 52 thru 28 Dec 63, was in what is now called Product Engineering and Process Technology Laboratory (PE&PT-LAB), formerly Manufacturing Engineering Laboratory, I request that special attention be paid for an equitable position there. Attached find the Organization Chart and charter of the PE&PT-LAB; even tho the names have changed, the functions are still the same. 28

I desire a hearing in this matter and designate the AFGE, Local 1858 as my representative.

/s/ Robert Paetz

Robert Paetz
P. O. Box 1594
Huntsville, Alabama 35807

Enclosures to Appeal of Robert Paetz
Social Security No. 418-60-4510

Document Title	Date	Enclosure
Separation Letter	16 Aug 71	1
Downgrading Letter	1 Sep 71	2
MSFC Public Information Questionnaire	1 Oct 71	3
Newsweek Article, "Where Are They Now?"	7 Jul 69	4
Notification of Personnel Action	1 Jul 60	5
Job Description A-3644-S	19 May 58	6
Notification of Personnel Action	7 Jul 60	7
Job Description A-2113-S	11 Jan 57	8
Notification of Personnel Action	9 Apr 61	9
Notification of Personnel Action	8 Apr 62	10
D. F. (Disposition Form)	16 May 60	11
Memorandum	9 Dec 60	12
Organization Chart	17 Jan 61	13
Staffing Chart	20 Apr 62	14
Staffing Chart	10 Mar 60	15
Job Description A-274-S (Kuers)	—	16
Job Description A-2110-S (Kuers)	11 Jan 57	17
Organization Manual	1958	18
Organization Manual	1959	19
Organization Manual	1960	20
Memorandum	3 Sep 63	21
Memorandum	25 Sep 63	22
Laboratory Mission Description	1958	23
Laboratory Mission Description	1959	24
Laboratory Mission Description	1960	25
Laboratory Mission Description	1961	26
Disposition Form	12 May 60	27
Organization Chart and Charter	22 Jan 71	28